United States Court of Appeals

for the Second Circuit

APPENDIX

B P/S 8cc

76-1142

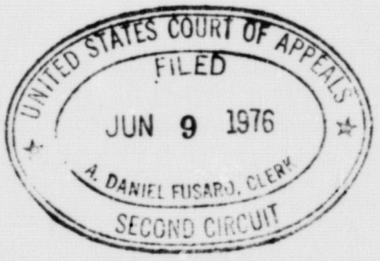
To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- RALPH BROWN, Defendant-Appellant.	Docket No. 76-1142

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
RALPH BROWN
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

UNITED STATES DISTRICT COURT — CRIMINAL DOCKET

Felony ☐ Minor Offense ☐ Other Misdemeanor ☐

JUDGE/MAGISTRATE: 0208 District | 1 Office

Assigned Trial Disp./Sentence: 0838

● U.S. vs. BROWN, RALPH — defendant

Case Filed: Day 20 | Mo. 11 | Yr. 75

No. of Defdnts: 02*

MAGR. CASE NO.

I. CHARGES

U.S. CODE SECTION	OFFENSES	COUNTS
21:846	Consp. to viol. Fed. Narco. Laws.	1
21:812,841	Distr. & possess. of Heroin,I.	2

BAIL ● RE
☐ Denied ☐ Pe ☐ Un
AMT Set (000) $ ____ Conditi
☐ date
☐ Bail Not Made
☐ Bail Status Changed (See Docket)

II. ATTORNEYS

U.S. Attorney or Asst.: Alan R. Kaufman (212) 791-0069

Defense ☐ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None ☐ Other ☐ PD. ☐ CO: John Gutman, Esq. Legal Aid Society

II. KEY INTERVALS & DATES

ARREST: ____ or U.S. Custody Began on Above Charges; ☐ High Risk Defn. & Date Design'd; ☐ Prosecution Deferred

INDICTMENT ☒: Information ☐ 11-20-75; Waived ☐; Superseding ☐ Indict/Info ☐

ARRAIGNMENT: 12-15-75; 1st Plea 12-15-75; Final Plea

Trial Set For; ☒ Not Guilty ☐ Nolo ☐ Guilty; ☐ Not Guilty ☐ Nolo ☐ Guilty

TRIAL: Voir Dire ☐; Trial Began ☒ J ☐ N J 02-02-76; Trial Ended 02-05-76

Disposition: ☐ Convicted ☐ Acquitted ☐ Dismissed: ☐ Nolled/Discon

III. MAGISTRATE

		'DATE	INITIAL/No.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant			
COMPLAINT ▶			
OFFENSE (In Complaint)			

INITIAL APPEARANCE — INITIAL/No.

PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled ____ Date Held ____
☐ Waived ☐ Not Waived ☐ Intervening Indictment

Tape No. — INITIAL/No.

OUTCOME
☐ Dismissed
☐ Held for District GJ — BOND ☐ ☐
☐ Held to Answer to U. S. Distric
AT:
Magistrate's Initials ▶

* Show last names and suffix numbers of other defendants on same indictment/information
Smith-2.

V. Exclud (a) (b)

IV. MAGISTRATE & DISTRICT COURT DOCKET ENTRIES

DATE	PROCEEDINGS
11-20-75	Filed indictment. 12-1-75 Adjourned to 12-8-75. Frankel, J.
12-8-75	Pleadings adjourned to Dec.15,1975 at 10:30AM in Rm 506. Metzner,J.
12-15-75	Deft.(atty.present) Pleads not guilty. Bail $10,000. cont'd. Case assigned to Judge Cooper for all purposes. Werker,J.
12-19-75	Filed the following papers received from Mag. Raby (Mag. # 75-1043). Docket Entry Sheet; True copy of Magistrate's Warrant of Arrest with return. Executed 9-12-75; Criminal Complaint, S.D.N.Y.; Disposition Sheet; Appointment of Counsel - Martin Ozer, 475 Fifth Ave.,N.Y.C. 10017 MU 5-7789; CJA Form 23 - Deft's. financial affidavit; Appearance Bond in the sum of $10,000 unsecured P.R.B.
01-05-76	Filed Govt's. notice of readiness for trial on or after 1-19-76.

-over-

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
02-02-76	Jury trial begun as to the deft. Ralph Brown before Cooper,J.				
02-03-76	Trial continued.				
02-04-76	Trial continued.				
02-05-76	Trial continued. Jury Verdict - Deft. guilty on count 1. Not guilty on count 2. Jury polled. Deft's. motions reserved until day of sentence. Pre-sentence report ordered. Probation notified. Bail fixed at $10,000 surety bond or $5,000 cash to be posted within 2 weeks. Deft. released pending bail to be posted.....Cooper,J.				
02-18-76	Filed deft's. apperance bond in the sum of $10,000 unsecured P.R.B. - deed to property at 110 Adelphia Ave., Atlantic City, N.J. and Title to 72 Checker Taxi Cab to be held by Ass't. U.S. Attorney co-sgined by brother Harry Brown ..acknowledged by the Clerk.				
03-17-76	Filed JUDGMENT (76,250) & COMMITMENT ORDER. The Deft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of TWELVE (12)YEARS, pur. to Sec. 3651 of T. 18 USC, as amended with provision that the DEFT. be confined in a jail type institution for a period of SIX (6)MONTHS, as provided in the aforesaid Section,Execution of the remaindier of the prison sentence is suspended & the deft. is placed on probation for a period of FIVE YEARS subject to the standing probation order of this court. The deft.is fined $5,000. This fine to be paid according to the conditions set forth by the probation department. The deft. is placed on special parole for a period of THREE(3)YEARS, pur. to Title 21,US.Code Sec. 841 to commence upon expiration of confinement. The Deft. is Remanded.....Cooper J. Issued Commitment 3-22-76.				
03-29-76	Filed Dfts. Notice of Appeal from Judgment dtd. 3-17-76. (mailed notice)				
04-05-76	Filed True Copy of J & C with marshals ret., Dft.Delivered to Warden,MCC,NY on 3-17-76.				
04-07-76	Filed CJA ~~XXXXXX~~ 20 Copy 2. approving payment to Martin Ozer,475 Fifth Ave.,NYC 10017.				
04-07-76	Filed CJA 20 Copy 5 - Appointing Martin Ozer,475 fifth Ave.,NYC 10017 as counsel for dft.				
04-21-76	Filed Notice of Certification of Record to the USCA.				
04-23-76	Filed Notice of Certification of Supplemental Record to the USCA.				
4-23-76	Filed transcript of record of proceedings, ~~dated~~ Feb 2-5-76; Mar 17-76				

(a) Interval (per Section II)	(b) Start Date / End Date	(c) Ltr. Code	(d) Total Days

AK:ko

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-v-

RALPH BROWN and
ARTHUR JOHN SMITH
a/k/a "Kayo,"

Defendants.

----------x

75 CRIM. 1123

INDICTMENT

75 Cr.

The Grand Jury charges:

1. From on or about the 1st day of January, 1975 and continuously thereafter up to and including on or about the 15th day of February, 1975, in the Southern District of New York, RALPH BROWN and ARTHUR JOHN SMITH, a/k/a "Kayo", the defendants, and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled ubstances, the exact amounts thereof being to the Grand Jury unknown, in violation of Sections 812, 841(a)(1) and 841 (b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about January 14, 1975, the defendants RALPH BROWN and ARTHUR JOHN SMITH, a/k/a "Kayo", left Thelma's Bar, 2556 Seventh Avenue, New York, N.Y.

2. On or about January 14, 1975, the defendants RALPH BROWN and ARTHUR JOHN SMITH, a/k/a "Kayo", met another individual in an automobile in the vicinity of Seventh Avenue and 148th Street, New York, N.Y.

AK:ko

3. On or about January 14, 1975, the defendants RALPH BROWN and ARTHUR JOHN SMITH, a/k/a "Kayo", agreed to sell one ounce of heroin for $1,400 to another individual.

4. On or about January 14, 1975, the defendant RALPH BROWN handed an aluminum foil package containing heroin to another individual in an automobile in the vicinity of 144th Street between Seventh and Lenox Avenues, New York, New York, at which time RALPH BROWN received $1,400 from the other individual, and BROWN then handed the $1,400 to the defendant ARTHUR JOHN SMITH, a/k/a "Kayo."

(Title 21, United States Code, Section 846)

SECOND COUNT

The Grand Jury further charges:

On or about the 14th day of January, 1975, in the Southern District of New York, RALPH BROWN and ARTHUR JOHN SMITH, a/k/a "Kayo", the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately sixteen grams of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

Joan Rozenstom
FOREMAN

Thomas J. Cahill
THOMAS J. CAHILL
United States Attorney

75 CRIM. 1125

Form No. USA-33s-274 (Ed. 9-25-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

RALPH BROWN and
ARTHUR JOHN SMITH,
a/k/a "Kayo",

Defendants.

INDICTMENT

75 Cr. _____

21 U.S.C. §§ 846, 812,
841(a)(1), 841(b)(1)(A);
18 U.S.C. §2.

THOMAS J. CAHILL

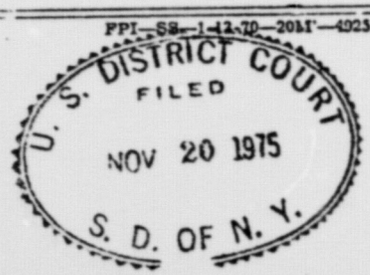
United States Attorney

A TRUE BILL

Jean Rosenstock

Foreman

FPI—SS—1-12-70—20M—4925



November 20, 1975 - Filed Indictment.

Ward J.

12/1/75 - Pleadings adjourned to Dec. 8, 1975 — Frankel J. AD

12/8/75 - Pleadings adjourned to Dec. 15, 1975 at 10:30 AM - Rm. 506.

Metzner J. MR

Dec. 15, 1975.

Deft. Ralph Brown (atty. Thomas Concannon) pleads NOT GUILTY. Bail $10,000. continued.

Deft. Arthur John Smith (atty: Martin Erzer) pleads NOT GUILTY. Bail ($10,000 ORB) continued. Deft. admits being a second federal narcotics offender.

Assigned Cooper J. for all purposes.

Werker J.

EB 2 1976 Deft. Arthur John Smith (Atty. Present) Withdraws
s plea of not guilty + Pleads guilty to Count 1 Only.
re sentence report Ordered. Probation notified.
entence march 10, 1976 at 10: Am.
resent bail Condition Continued.

Cooper, J.

FB 2 - 1976 Jury trial began as to the defendant
alph Brown Before Cooper, J.

3 - 1976 Trial Continued.

B 4 - 1976 Trial Continued.

B 5 - 1976 Trial Continued. Jury Verdict - Deft Ralph Brown
uilty on Count ① one not guilty on Count ② Two.
ury Polled. Defts motions reserved until day of sentence.

re sentence report Ordered. Probation notified.
ail fixed at $10,000 Surety Bond or $5,000 Cash
be Posted within two (2) weeks.
Deft. Released Pending Bail to be Posted.

Cooper, J.

AR 17 1979 Deft. Ralph Brown sentenced (atty Present)
Twelve (12) years. Pursuant to Section 3151 of Title 18, U.S.C.
as amended, With Provision that the deft. be confined in
a Jail type institution for a period of six (6) months. as
provided in the aforesaid Section. Execution of Prison
Sentence is suspended & the deft. is placed on Probation
for a Period of five (5) years, subject to the standing
probation Order of this Court.
The deft. is fined $5,000. This fine to be paid according
to the conditions set forth by the Probation Dept.
The Court requests Progress reports. The deft is placed on
Special Parole for a Priod of three (3) years, Pursuant
to Title 21, U.S. Code, Section 841 to commence upon
expiration of Confinement & Deft. is remanded.

Cooper, J. 14

MAR 17 1976 Deft., Arthur John Smith sentenced (Atty. Present) to Ten (10) years, Execution of Prison sentence is suspended and the deft. is Placed on Probation for a period of five (5) years, subject to the standing Probation Order of this Court. The court requests Periodic Probation reports (Quarterly.)

The deft is fined $ 3,000. fine to be paid as the Probation Department directs.

Count 2 open

Cooper, J.

CHARGE OF THE COURT

THE COURT: (Cooper, DJ) Madam Forelady, ladies and gentlemen of the Jury: I would be sadly remiss if I failed at the very outset of the judge's charge to the jury to express to each one of you the keen satisfaction that comes to the court and to counsel for the undivided attention that you have constantly demonstrated throughout the course of this trial.

It is evident that so far you have discharged your duties with fidelity. You have followed the testimony with intelligence, with understanding, and with an absorbing interest. I am quite satisfied that no single matter relating to the fact issues has escaped your attention.

You have been silent throughout and when your turn comes to speak, I have every confidence and I am sure counsel on both sides join me in this, that in accordance with the solemnity of your oath and the high order of your conscience, you will pronounce the justice that is due in this case.

I take these things seriously. Justice is a serious matter. The doing of justice is difficult. It is a challenge. The moment we begin, as some of us have, to say, So what?" or "Who cares", "big deal", "why get yourself all excited, it is just another case", even a bright high school kid can see the danger in that type of sentiment. So

I have never taken it indifferently.

If we mean to do justice, then it is not a game. You are not here as spectators. Your selection was the result of great care, exercised by the court and counsel. Your mission is not easy; we are sure you did not expect it to be so.

Let me read you what a great philospher, a Nobel prize winner, had to say about the very thought that I am lumbering along with, in order to get it across. He said, "Justice dies from the moment it becomes a comfort, when it ceases to be a burning reality, a demand upon one's self." Those are his very words.

So, it is a demand on you and on me and you must have seen the judge's attention, the judge's insistence, that this matter be properly dealt with and presented to the jury. I can sit here and say, "I am not a fact finder, they are. Why do I have to exercise myself with the witness? It is none of my business, that is for the fact finders, not for me; it's not my job, I am here to lay the law down."

I couldn't do that sort of thing if I live to be 125.

You have got to hear every word because you are the ones who have to judge the truth and you are the judges of the facts, and how can you judge the facts if you don't

hear? Very often counsel do nothing about urging the witness to speak up. In my time I used to sit down with a witness and say, "Do you recognize you are going to talk to a jury? They never saw you before. I want you to speak up. I want you to show me now how you are going to answer questions, what kind of voice you are going to use." That's the way I made mighty sure that the witnesses I called were heard, each and every word.

We are indebted to counsel for their concern with the interest of their clients. They showed a deep belief, a feeling of conviction, that their side should prevail, and they exercised themselves about it.

But the lawyers are not on trial, they are the representatives of the litigants and they are here to delineate the facts, which they have done; one side claiming the guilt has been established beyond a reasonable doubt and the other side saying that the defendant, under the law and on the facts, is entitled to an acquital, and that is where the challenge comes in and that is what brings us together.

When I see counsel genuinely trying to do their level best, I am grateful for that show of spirit. I like to see people who care and that is what I have noted about this jury. You have been hanging on every word, you have

been listening intently, and you are anxious to fulfill you mission, and to do honor to your oath.

Let me say a word about objections that counsel have interposed from time to time. Please understand that counsel not only have a right but it is, indeed, their sworn duty, on the offer of certain evidence, to press whatever legal objections there may be to its admission, and that is what has happened here. You heard the court make rulings and we proceeded with the case.

Now, with those comments about counsel we leave them. Why? Because we are concerned with the only litigants to this case, the defendants on the one side and the government on the other.

This is not a contest in salesmanship; it isn't a battle of wits; it isn't a clash of personalities. It is by law pronounced to be a search for the truth. If you can leave this courthouse with the firm conviction that your verdict is consistent with the truth, then indeed your duty will have been done, because the only triumph in any litigated case is the triumph of the truth.

As I told you when you were being selected, every defendant, every defendant regardless of his race, creed, color, age, regardless of his impediments of any kind, is entitled to a fair trial under our law. And the very same

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legal propositions of law must be charged by the judge to the jury regardless of who the defendant is; whether the defendant is successful, or waiting for success; whether he is ignorant or well-informed; crude or polished; highly esteemed or despised; whether he is a member of a good or a bad family; yes, even if he is an avowed enemy of our society, each is entitled to his day in court and that justice be done according to the facts in the case and the law of the case, and that is it. That is what America stands for.

If this defendant on the facts and on the law is guilty, vote him guilty. And on the facts and the law, if you find him not guilty, acquit him.

You are not here to do any favors for anybody. Whether you like the judge or like the lawyers, or don't like them, that hasn't got a thing to do with it. YOu go in and buy a garment or a steak and you decide the merits,the quality of the garment or the steak. What has that got to do with whether or not the salesman was pleasant or unpleasant; or whether the place where you bought it was a veritable emporium or a junk shop? You are talking about the steak, you are talking about the garment and that is all you are concerned with. What is the proof? What is the law? And you swore that is all you would weigh.

Ipointed that out while you were being selected.

I went over it backwards and forwards. And so when I say to you, or give you a proposition of law, that is it. You don't sit here like barons of old that we read about when we went to school, who decided on whim or caprice which one went to jail, which one was hung up and which one went free, or who got the bag of gold, or who was left in abject misery. You have no such power; neither have I.

Neither you nor I are here to please anyone. We have a sworn duty to perform, and we must discharge it if justice is to prevail.

After all, as I pointed out to you when you were being selected, it is your justice, your justice as much as mine; it is your courthouse, for black, for white, for poor, for rich; it is your burden as much as my burden and you've got to get exercised about the doing of justice as much as I. Otherwise you have no right to undertake to be an American minister of justice.

We have reached the point where you are about to undertake your final function as jurors and here you perform one of the most sacred obligations and responsibilities of citizenship. YOu are, and make no mistake about it, what the Supreme Court of the United States has said of you, you are the sworn ministers of justice.

You are to approach your duties in an attitude of

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around, no monkey business, this is it, right down the middle.

At one of the conventions during an intermission some of his admiring followers gathered around him and one of them said, "Mr. Justice, what do you expect of a judge?" and without hesitation he said, "I expect him to call them as he sees them, as they come across the plate, just the way that referee is doing over there at that game."

The judge is to call them as he sees them, as they come across the plate. You are the judges of the facts, and you call them as you see them, as they come across the plate. Be satisfied with the applause of your own conscience. The devil with what anybody else thinks or says.

I told you when you were being chosen that under our law when the government comes into court, it is merely another litigant. It is entitled to no other or extra consideration and, of course, by the same token, it is entitled to no less consideration.

You must find whether or not this defendant is guilty on two separate charges against him. The first count being what we call a conspiracy count and the second count charging him with committing one of the acts falling within the objective of the conspiracy .

At the outset let me say that your burden has been

complete fairness, complete impartiality, and to appraise the evidence calmly and deliberately, and, as was emphasized by me when you were being selected, without the slightest trace of sympathy, bias or prejudice, for or against the government or the defendant.

What I have just said is as important a part of my charge as anything I am going to say to you. I told you when you were being selected that I have lived on both sides of the tracks, and I told you that I have seen the horror and misery and life in the raw that is bound to come out and be revealed in the courtroom. And along with it, I have seen the glory of man exercising the highest deportment in a civilized state.

One of the lessons I have learned and learned early, was to be satisfied with the applause of my own conscience. There was a great judge in New York who sat on the Supreme Court of the United States, Mr. Justice Robert Jackson. I got to know him somewhat and one of the regrets of my life is that I was not afforded the opportunity to get to know him more.

He was a great judge. Why, because he knew the law? No, that was just half of it. He knew human beings. He knew their stresses and strains and he knew their strengths. He was beloved by lawyers. He was a firm judge, no playing

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lessened by the defendant's testimony, summarized by his own lawyer, which included an admission that the act was done by him as far as procuring heroin for cash. The facts surrounding that transaction have been amply stated. Nevertheless, the law makes it imperitive that the jury be instructed as to the total law applicable in the case, in its entirety, so the jury may have before it all the facts and all the law on which to predicate a verdict.

We say with great pride and we mean it, that all parties, government and individuals alike, stand equal before the bar of justice. Your final role is to decide the fact issues that are in this case. YOu and only you -- not the judge, not the counsel -- are the exclusive judges of the facts.

You and you alone pass upon the weight of the evidence. You and you alone determine the believability or the credibility of each witness. You and no one but you, resolve such conflicts as there may be in the testimony of witnesses, and you and only you, the jury, draw such reasonable inferences as may be warranted by the evidence.

So you see why the law names you and you alone to pronounce the last word, so to speak, on what the total trial record points to as to the guilt or innocence of the defendant on trial.

This may surpise you but in a Federal court the United States trial judge, and I am one, has a perfect right to comment on the evidence to the jury. I can tell you what I think of every witness who got on that stand. All I need to add is that this is my estimate and you are not bound by it.

I can say of a witness that I wouldn't believe him if he took an oath on a stack of bibles reaching from the floor to the ceiling. I could say of another witness, he spoke the gospel truth. So you see, in the Federal court, the judge doesn't have to sneak over anything by looking at you and looking at the witness or in some way indicating to you the judge likes or doesn't like the witness. I don't have to, I can comment on it.

Why don't I? I have never done it, thatis your job. The law says it is your job and that is where it belongs and I don't want to hint anything, I don't want to butt in, so to speak. I don't want to invade your orbit; I would resent your trying to tell me what to do with regard to the law.

So when I say to everybody in the courtroom, "All rise", what do I mean by that? It is a show of respect for the burden that you carry.

Since I have the right to talk to you about the

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case, or the evidence in the case, I am not going to do it, I forbid you from trying to read into my voice or the emphasis that I may place here and there, how I feel about the facts. If I wanted to tell you, I would tell you right out.

Another lesson I learned, when you got something you believe in, you go up the front way, you don't go sneaking around the back. I don't have to sneak around the back, I can go right up the front way. Since I am not doing it, I don't want you to say, "Did you see how the judge reacted to this, that and the other?"

The only thing you ever heard me do or saw me do, as you have a right to have observed, is that I was impatient at times with witnesses who wouldn't speak up or who I thought were expanding on answers.

My function is to instruct you as to the law, and it is your sworn duty to accept the law as I state it to you in these instructions and to apply the law to the facts as you, the jury find them. Your oath compels you to apply the law regardless of your personal opinion as to the wisdom or the rightness of any part of the law.

I speak very plainly when I tell you that your oath compels you to apply the law as laid down in these instructions. It is unthinkable that a jury would do

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otherwise, for that would be violating your oath. It would be the same as a lawyer violating the oath for which he could be disbarred or a judge violating his oath, for which he could be removed from judicial office.

So you recognize why I grow impatient and angry when, after a trial is over, Ilearn that the jury did not observe the law, and becoming its own legislators and laying down its own law.

You are not here in an executive capacity, you are not here as part of the legislative branch. You have enormous power, but you must keep it within the limits prescribed by law. You must determine on your oath and according to your conscience the guilt or innocence of this defendant, based exclusively on the trial record before you.

What do we mean by that? That means the sworn testimony, the exhibits, the stipulations entered into by both sides, everything that went into the record, within your sight and hearing, and the instructions on the law given to you by the court.

With regard to any fact matter, it is your recollection and yours alone that governs. Anything that counsel, either for the government or for the defendant may have said with respect to matters in evidence, whether during the trial or in a question or argument, or in summation, is not to be

substituted for your own recollection of the evidence.

So, likewise, anything I may refer to, if my recollection doesn't accord with yours, your recollection prevails; your recollection is paramount.

Before we consider each charge against this defendant, and what is required to sustain each charge, there are certain preliminary observations that are in order, certain principles of law that are applicable in every criminal case, and to some of them I referred while you were being chosen.

Such is human nature, and I see this very often and I cringe when I hear it, people apply the term "boilerplate" to these fundamental principles of law which have been hammered out by the blood and sweat of great advocates in the past and great judges and great legislators. A glorious part of our country's judicial history and they refer to it as boilerplate. It is not boilerplate to me.

I have said them hundreds of times and on each occasion I regard myself as privileged to pronounce these sacred propositions of law.

One of them is that an indictment is merely an accusation, a charge. It is a method by which persons accused by a grand jury of crimes, are brought into court and their guilt or innocence is determined by a trial jury, such as

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you are. It is no evidence whatever of the guilt of a defendant, and you will not give any weight whatsoever to the fact that an indictment has been returned against this defendant.

So when you get in there and someone says, "But he was indicted, wasn't he? Doesn't that show he was guilty?" Answer the way I have charged you, "The judge told us that is no evidence of guilty whatsoever, why are you saying what you are saying, sir or madam? Let's go back into the courtroom and have the judge repeat that."

Or, "I feel sorry for the defendant and his family." I have heard that. Then you have to look that person right in the eye and say, "Did you hear what the judge said to you? That hasn't got anything at all to do with your job."

Do you understand me, Madam, and do you see the wisdom of that? This defendant here has pleaded not guilty. He has a perfect right to plead not guilty, that is our law. And the government under our law has the burden of proving guilt beyond a reasonable doubt. I am going to define that term for you shortly. That is the law.

You charge anybody, you say after all that bloody history of people being tortured and tormented and put on the rack and their tongues pulled out and legs chopped off along with their hands, say yes, and they died on the rack

because they wouldn't say yes. So, as a result of all of that, these great principles of law have been handed down and that is how it comes to pass that we say that an indictment by a grand jury is no proof of guilt; that a defendant is presumed to be innocent of the charge and that when you want to charge anybody, or if you so charge anybody, that is just a charge and you've got to prove it, and prove it beyond a reasonable doubt or fold up and pass on, let him go.

That is not to say that the judge is indicating how he feels about guilt or innocence here. I just want you to understand these principles of law so that you can apply them. I can give you some fancy gobbledegook too, and I know from past experience the ignorance of juries with regard to certain language that the law prescribes. They think they know it and when they come to apply it, they have twelve different opinions. Then we get all kinds of notes showing that they did not understand.

Well, I am troubling myself to have you understand. I can get through with this charge in one-fifth of the time and it will be a perfect charge in the eyes of the law, but I wouldn't be at all sure you understood what I said. Therefore, I couldn't rest and be at ease; my conscience would bother me.

There is a burden upon the government under the law to prove a defendant guilty beyond a reasonable doubt. That never shifts, it doesn't go from the government to a defendant. The government always has that burden of proving a person guilty beyond a reasonable doubt.

It has that burden from start to finish. It is our law that a defendant does not have to prove his innocence. On the contrary, as I told you when you were being chosen, he is presumed to be innocent of the accusations contained in the indictment.

As I told you when you were being selected, this presumption of innocence is a protective shield covering this defendant. It continues in his favor throughout the entire trial and right as I talk to you at this moment, that presumption of innocence continues in his favor.

That shield of presumption of innocence surrounds him during the course of the entire trial. It even continues to shield him while you are deliberating.

This presumption of innocence is removed only when you, the jurors, declare that guilt has been established beyond a reasonable doubt. Then that protective shield has been pierced, it no longer protects him, it falls away from him and that is that.

The presumption of innocence is sufficient to

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acquit a defendant of the crime charged unless it is overcome by evidence that satisfies your mind beyond a reasonable doubt of the defendant's guilt; and unless you are so satisfied, it is your sworn duty to declare him not guilty.

If, on the other hand, you do not have a reasonable doubt as to his guilt, it is your sworn duty to declare him guilty.

What is all this reasonable doubt about? There is nothing mysterious about reasonable doubt. If you will pay strict attention as I know you have, you will get it.

How much evidence does the government have to place before a jury in any criminal case? Must it be evidence beyond any possible doubt? No, a thousand times no. This is not a mathematical problem where you put a lot of figures on a board and everybody can add them up and come to the same total.

You are dealing with human beings, with flesh and bone and brain and soul. So the words are reasonable doubt and they mean there is a doubt founded in reason, not imaginary, founded in reason and arising out of the nature of the evidence in the case or the lack of evidence in the case.

It means a doubt which a reasonable person has

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after carefully weighing all the evidence; it means a doubt that has substance and is not shadowy. Reasonable doubt is a fair doubt, it is a doubt which appeals to your reason, your judgment, your common sense, your understanding, and arising from the state of the evidence.

A defendant is not to be convicted on suspicion, conjecture or even impressive evidence which does not rise to the dignity of significant persuasiveness.

Reasonable doubt is not caprice, whim, speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant, or a desire to uphold the government.

If, after a careful and impartial consideration of all the evidence in the case from the start to finish, you can candidly and honestly say under your oath that you are not satisfied of the guilt of the defendant and that you do not have an abiding conviction of his guilt which amounts to a moral certainty, then you have a reasonable doubt and, in that circumstance, it is your duty to acquit.

On the other hand, if after such a fair and impartial consideration, you can candidly and honestly say that you are satisfied of the guilt of the defendant, that you do have an abiding conviction of the defendant's guilt which amounts to a moral certainly, I mean such conviction or

certainty as you would be willing to act upon in important and weighty matters in your own personal affairs, private lives, then you have no reasonable doubt and, in that circumstance, it is your duty to convict.

The law says that a reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule that proof would have to be adduced beyond all possible doubt, hardly anybody would ever be convicted no matter what criminal act he may have committed for the simple reason that it is practically impossible for a person to be absolutely and completely convinced of any controverted fact, which by its very nature, is not susceptible of mathematical certainty.

If a man makes out a will which is impervious to attack, you see by the will what he wants done. It is like going into a grocery store and ordering a series of articles. There are descriptions for all to see, that is easy.

We are not dealing with a will case, we are dealing with conduct of people where there is no writing and from all of which you must determine the purpose that brought us together, and that is whether the government has proven the charges against the defendant beyond a reasonable doubt.

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So, in consequence, the test in a criminal case is, I repeat, that it is sufficent if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt.

You may not draw any inference, favorable or unfavorable, toward the government or to this defendant Brown, from the fact that Smith also referred to as "Kayo"-- Smith is named in the indictment along with this defendant on trial before you. Smith is not before you. I don't want you to guess what happened to Smith or what happened to his case, or anything like that. It is none of your business, don't start to guess.

When you start to guess whether along this line or any other line, that is when justice gets a punch in the nose, and, for that matter, where justice is laid low.

You don't conjecture, you don't guess. The judge told you Smith is not before us, the only one before us is Brown. SO don't you say -- I learned that some jurors would say in similar cases, "What happened to Smith?" But what is that kind of stuff? It is none of your business, the judge told you that. That is all you have to be concerned with.

Let's turn to the specific charges against this defendant. The first count is a conspiracy count. It

charges that the defendant with others to the grand jury unknown, along with Smith, conspired to violate the Federal narcotics laws. That is called a conspiracy count. I will come to it in just a minute. I will try to make it perfectly clear to you.

The second charge or count against this defendant says in effect or charges him with distributing and possessing with intent to distribute, 16 grams of heroin.

A conspiracy to commit a crime is an entirely separate and different offense from the substantive crime which is the object of the conspiracy. The essence of the crime of conspiracy is an agreement or understanding to violate other laws, and an act done to carry out that unlawful agreement.

That sounds good, doesn't it? Without casting aspersions on you, I am ready to prove that almost every one of you doesn't know what I just said, so I am going to break it down into simple terms so that you do get it.

Take this rough example. One man, let's call him A, says to B, "Hey, I'm going to knock over the bank down the street."

B says, "When are you going to do it?"

A says, "I don't know, I think I'll do it tonight sometime."

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"Well," B says, "what's wrong with me? How about letting me get in on this?"

A says, "You want to?" B says, "Sure."

A says, "You're in." They shake hands.

What happened? There you have a plan to rob a bank, it's as simple as that. Just takes three seconds to say it. It's very clear what was said, knock off the bank, rob the bank. Then you have, ifyou were to believe it, B saying "Let me in on it", so you have two people and there must be at least two before you can have a conspiracy.

So you have two people entering into an agreement to knock off a bank. They don't sit down and have a written contract which they swear to before a notary public.

By words and actions you ask yourselves has there been proof beyond a reasonable doubt that there was a conspiracy here between Brown and Smith, and others, to sell drugs?

So coming back to my bank example, if there was a clear understanding as to whatthe object was, and that was to rob a bank, and a clear depiction that A and B agreed to be parties to the planning, then you have an understanding, a meeting of two minds.

What do we mean by a meeting of two minds? It

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means an agreement where you go into a grocery store, most of us go in and say "milk", that is all we say, "milk", one word. We put some money on the counter, there is an act, money. The grocer gives us a quart of milk, hands it over, that is a meeting of minds. You want to buy and he wants to sell. That is a contract.

That is a meeting of the minds, and in the eyes of the law, that is just as good a contract as a contract running into thousands of pages between I T & T and American Tel. & Tel.

So all it takes here in a conspiracy is a plan to do something with regard to violating a Federal law, in this case narcotics, and in the case I gave you, robbing a bank.

Now, suppose theydon't rob the bank; what about it? It would still be a conspiracy, it would still be a crime. If on top of it they went and robbed the bank, that would be a second crime. Do you get it? Is it coming through?

Now, the law says that if you have a conspiracy and there are willing members to that conspiracy, the law demands that there be proof that the conspiracy was not abandoned. They just didn't say, "Well, yes, let's do it," and then drop it. If all they did is plan something and

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just talked about it but didn't take any step in connection with it, the law says no harm done, forget it; no crime.

But if a step is taken to carry out the objective of the conspiracy, in the rough example I gave you before, rob a bank, if a step is taken, even innocent on its face, then the conspiracy has been made out completely. Suppose I give you an example.

Suppose B, in the rough example I gave you, without telling A, called the bank -- a perfectly innocent thing on its face -- "Hey, what night are you open?"

"Thursday." "What hour?" "Until nine o'clock." Perfectly innocent. But what was he doing? He was trying to find out when this bank would be open in connection with the plan to rob the bank. So he took a step. Then you've got the conspiracy completed.

It's got to be proven, every one of these elements, must be proven beyond a reasonable doubt. You have to be satisfied beyond a reasonable doubt, as I have defined reasonable doubt for you, that there was a conspiracy between two or more people, that those who were in it were really willing, knowledgeable participants, with full intent to be members of that conspiracy, and that a step was taken to further the objective of the conspiracy.

That is logical. Why does the law say this?

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Why does the law insist on it? Let's reason it out.

When you have one wrong-doer, he presents a problem, but no where near the problem of a group of fellows getting together, planning to do a wrong. That continues, the ugly tentacles bore deep into the earth, it takes years before you can break up what we commonly call a racket. And what is a racket? A racket is a conspiracy to violate the law.

You got the big shot on top and the little errand boy underneath, and you have a real active, going concern that can hold the community by the throat for a whole generation. So the law says the moment you start getting together, the moment you gather around together and agree among yourselves to violate a Federal law, you are guilty of conspiracy, provided these three elements that I spoke about have been proven beyond a reasonable doubt.

I don't care that you didn't do it finally, you conspired to do it. Says the law, that is a crime. And I'll tell you somthing else, mister, everything that was done by the other fellows in the conspiracy is binding on you, whether you knew about it or not, so long as what they did was to carry out the conspiracy, because everyone of them is your agent as much as you are their agent.

We are going to hook you with it because you

knew the conspiracy, you knew the plan, you knew what was at stake and you agreed and everything that they have done, they did to carry out the very thing that you agreed to carry out.

That is how it comes to pass that the big shot on top who lays down the rules and the steps and has an idea every other minute as to how the conspiracy can be enlarged, he can be held accountable as a conspirator as much as the errand boy down at the bottom of the ladder, who knows what the conspiracy is all about, what its objectives are, and who consents to become a part it it.

He is bound by it, he is bound by everything that the leader does in connection with those objectives of that conspiracy -- to push drugs, to push counterfeit, to transfer across state lines stolen securities, to do wrong as to any Federal law, to break any Federal law.

If you get together to do it, that is a conspiracy and that is a separate crime from the actual doing of it.

Madam Forelady, have I made that clear to you?

THE FORELADY: Yes, sir.

THE COURT: How about you, Mr. Lichterman?

JUROR NO. 2: Yes.

THE COURT: Any question, Mr. Gurian?

JUROR NO. 3: No,sir.

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THE COURT: How about you, Mr. Gordon, have I come through?

JUROR NO. 12: Yes, sir.

THE COURT: Mrs. Sullivan, you got it?

JUROR NO. 11: Yes, sir.

THE COURT: Mrs. Goldberg?

JUROR NO. 10: Yes, sir.

THE COURT: What do you say, Mr. Loew?

JUROR NO. 9: I agree to everything; I understand it perfectly.

THE COURT: Very well. I haven't asked everyone, I wanted to get a sampling as to whether I have come through, whether you understand what the law insists on.

So what you must find, and find beyond a reasonable doubt in this case, are three separate elements. I have already told them to you but I'm going to give them to you in the clipped language of the law.

Number one, you must be satisfied beyond a reasonable doubt of the existence of the conspiracy charged in the indictment. I already told you that.

Number two, you must be satisfied beyond a reasonable doubt that this defendant knowingly and wilfully associated himself with the conspiracy, not just as an on-looker, not as a spectator, not just somebody who knew

what was going on but didn't make himself a part of it.

And the third element that must be proven beyond a reasonable doubt is that one of the conspirators committed at least one of what we call overt acts, and that is the step that I referred to, a step that was taken in connection with the objective of the conspiracy, like that telephone call I gave you as a example.

I am glad to see you nods your heads, that is encouraging to me,so I don't have to bore you with repetitive comments.

If the government fails to establish each and every one of these three elements beyond a reasonable doubt, no matter how much evidence it may have had on one or two, it must have evidence on each one of those three beyond a reasorable doubt, and if it has, then you may declare the defendant guilty. If the government failed with regard to any one of those elements, to prove any one of them beyond a reasonable doubt, the defendant is entitled to acquittal.

Let's read the language, there's nothing fancy about it at all. A high school boy can read it and understand it.

"The grand jury charges from on or about the first day of January 1975 and continuously thereafter up to and including on or about the 15th day of February, 1975,

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in the Southern District of New York, RAlph Brown and Arthur John Smith, also known as "Kayo", the defendants, and others to the grand jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate"a certain law enacted by Congress, that is, that law dealing with narcotic drugs.

"It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances" which includes heroin, "the exact amount to the grand jury unknown in violation of law."

So there you have a charge that Brown and Smith and others to the grand jury unknown, got together and decided on a plan to possess for the purposes of distributing, heroin.

Well, the defendant admits he had the heroin. He got it, he turned it over, it was paid for. What are his defenses? That he was a victim, he was taken advantage of, as I shall explain, and if you find that he was taken advantage of within the meaning of the law as I shall lay it down to you, then no matter that he did possess it, no matter that he did get $1,400 for it, no matter what you

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think of it, if you are convinced that he was taken advantage of within the meaning of the law, then you throw the case out; he is entitled to acquittal.

You see, the principles of law to me are greater than you, greater than all the lawyers and the judge. They prevent us from having to operate in a jungle. I am just explaining it to you, to make it simple, so that you will understand what we have here and I am not saying that you should believe or shouldn't believe, I am just telling you what is being argued and what is being presented to you; what your minds are being addressed to, so that you can cope with the different angles of the case.

Your understanding of so much of what I have said -- I have looked at you -- has helped me enormously so I can really cut out a great deal of what I had prepared to say to you in fancier language.

I talked to you about not reducing the agreement to writing -- that hardly ever happens.

I talked to you about it taking at least two people to make a conspiracy; one person cannot enter into an agreement with himself, so it takes at least two people.

Some conspiracies are very extensive; others are not, they play it closer to the vest. It's a smaller outfit so to speak.

Was there a conspiracy? Did Brown on the evidence before you consent to be a willing member of that conspiracy, which was to push drugs, to sell drugs? Are you satisfied beyond a reasonable doubt that those three elements that I spoke about have been established to your satisifaction beyond a reasonable doubt?

I should add like many or most of the things in the law, a conspiracy is not required to be established by so-called direct evidence. The unlawful agreement or understanding which, as I have said, is the heart of the matter, may be found if it is found at all, as a matter of inference from the conduct of the people alleged to have comprised or participated in the conspiracy.

Look here, 99 per cent of thecases we don't have a film. If we had a film of what people did we wouldn't need you. You've got little bits here and big chunks there and you got to put it all together: the movements of people, what they say, where they were, in order to determine whether there was a conspiracy and whether Brown was a willing member of the conspiracy and whether an act had been taken to carry out the objective of the conspiracy.

I will tell you again that mere association by one person just hanging around and listening but doing

nothing in connection with it, and not undertaking to do anything and not doing anything that makes him a member of it, you have to determine that like you do everything else, from allthe circumstances. But mere association, and hanging around, is not the equivalent of membership.

You must be satisfied that there was an intent to be a member. And there was a willingness and knowing on the part of the person to be a member; he knew what he was doing. On all of that you must be satisfied beyond a reasonable doubt.

You must focus on the defendant's relationship to the crime and not solely upon his relationship with others accused of committing the crime. His relationship to the crime must be sufficiently substantial to satisfy the concept of personal guilt.

Now, what I told you already in simple language, does that help you to understand this more complicated language? I am grateful to see the encouragement when you nod your heads in approval.

I have maintained it and lots of people say, "Why do you do it? Why wear yourself out, it's simple, they understand it." Well, they don't understand it and I 've got to give them both in my book.

So I repeat, a defendant may not know all of

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conspirators, yet, if he knows there is a conspiracy and if he has knowledge of its basic objectives and aims, and joins it, then he adopts as his own the past and future words and acts of all the other conspirators in furtherance of the conspiracy as he understands it, even though he may not have been present when the words were said or the acts were done. That is what I told you before, right?

Accordingly, to find the defendant before you guilty under the conspiracy count, you must find that he entered into the conspiracy with specific criminal intent and knowledge. The only way you have of arriving at the state of mind of the defendant in the case before you is to take into consideration all the facts and circumstances shown by the total evidence.

Direct proof here with regard to wilfull or wrongfull intent and knowledge is not necessary. They may be inferred from acts or a combination of acts. These are questions of fact to be determined from all the circumstances by you and you alone.

For instance, suppose you are satisfied that on one of these occasions Smith, also known as Kayo, was in the car. Suppose you further accept or are convinced of the testimony as to what was said during that period of time, even if the amount of words coming from Smith may have been mighty few,

if any at all, you must decide whether that particular episode, not just that alone, but that the particular episode has meaning for you under all the circumstances that then existed. Does that show that Smith had knowledge of what was going on and was a willing participant? Is it some evidence in that direction?

Likewise, with regard to the defendant on trial, it would be easy if each and ev ry time you have a trial the defendant was to come into the trial and there was a complete confession signed by him. What is there to that? Hardly ever happens.

I know the movies have it, but in my experience it is about one out of a hundred. So where the act doesn't exist, the jury may be hard put to it, but that is the function of the jury, to determine whether or not there was a conspiracy and whether the defendant on trial was a member thereof.

A word about that and I might as well give it to you. The government must establish beyond a reasonable doubt that the defendant, aware of its purposes and objects, entered into the conspiracy with a specific criminal intent; that is, that a defendant knowinly did an act which the law forbids purposely intending to violate the law.

Let's talk about the overt acts. I told you that

an act must be done by a conspirator, one act by one conspirator, in connection with the objectives of the conspiracy, like the telephone call I gave you in the rough example. That is called an overt act. I told you already what the law says you have to prove, you have to prove that beyond a reasonable doubt.

The law goes further than that and says you are directed to put into the indictment some of the overt acts, not every overt act, not every step taken, but you must allege at least one overt act and prove it. Even though on its face it appears perfectly innocent, let me tell you what the law says on overt acts.

The offense of conspiracy is complete only when the unlawful agreement is made and any single overt act to effect the object of the conspiracy is thereafter committed by at least one of the conspiractors.

What is an overt act? I have already indicated to you it is any step or act or conduct, even innocent on its face, like a telephone call, which is taken to achieve, accomplish or further the objective of the conspiracy.

The purpose of requiring proof of one overt act is that while parties might conspire and agree to violate the law, they may change their minds and do nothing to carry it into effect, in which event it would not constitute an offense.

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The overt act need be neither a criminal act nor the very crime which is the object of the conspiracy. It need not be committed by the particular defendant under consideration. Let me read to you the overt acts that are set forth in the indictment, they are very short.

"In pursuance of said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

"1. On or about January 14, 1975 the defendants Ralph Brown and Arthur John Smith, also known as "Kayo" left Thelma's Bar, 2556 7th Avenue, New York, New York.

"2. On or about January 14, 1975, the defendants Ralph Brown and Arthur John Smith met other individuals in an automobile in the vicinity of 7th Avenue and 148th Street, New York, New York.

"3. On or about January 14, 1975, the defendants Ralph Brown and Arthur John Smith agreed to sell one ounce of heroin for $1,400 to another individual.

"4. On or about January 14 the defendant Ralph Brown handed an aluminum foil package containing heroin to another individual in an automobile in the vicinity of 144th Street between 7th and Lenox Avenues, New York, New York, at which time Ralph Brown received $1,400 from the other individual and Brown handed the $1,400 to the defendant Smith."

The guilt of a conspirator is not measured by the extent or the duration of his participation in the conspiracy. Nor is it necessary that he receive a pecuniary benefit for his participation. Even if he didn't get a cent, that has nothing to do with it, that is the law. If a defendant participated in a conspiracy to a more limited degree than others, or if he received less benefit than others, he is equally culpable so long as he was in fact a conspirator.

How is that right? The judge says the big shot at the top and the little guy at the bottom, both held. Is that fair? Yes, it is fair, nothing wrong with it. Should they get the same punishment? Nothing to do with you, it is not your job.

Commons sense will tell you when it comes to sentence, the judge would know the extent of the work done by one and the extent of the work done by another. The sentence would be meted out accordingly. It doesn't take a great Solomon or a great mind to figure that out, but the point is you got nothing to do with that. You are not to be bothered with that at all.

Common sense will tell you that undoubtedly is what generally follows, the big one, the more active one is dealt with more severly than the others, that's the ordinary rule of thumb. But I say again, you have no concern about

that and you just have to ask yourselves, "I don't know from nothing" is the common vernacular, "I don't know about that. Don't talk to me and don't bother me about anything other than the facts and the law as to whether or not this defendant committed the acts charged in the indictment. That's all I know, I don't want to be bothered with anything, I got plenty to do . I don't have to take on anything more. The judge said that would be plenty and I agree with him." That's plain talk.

Well, We are not doing too badly because of your attention for which I am grateful.

I am told to tell you and I do that Manhattan and The Bronx are in the Southern District of New York.

Let's pick up the second count. What is the second count? It is simple.

"The grand jury further charges:

That on or about the 14th day of January, 1975 in the Southern District of New York, Ralph Brown and Arthur John Smith also known as "Kayo" the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance to wit, approximately 16 grams of heroin."

They had it, possessed it, transferred it sold it, did something with it, which the law prohibits. And, as I

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said before, the defendant does not contest that he did have it, he did procure it, that he did deliver it.

However, as I told you at the beginning, you must know all the law applicable to this case regardless of what the defendant said or what motivated him to say it, you still have to weigh everything that came from the witness stand. Actually, let me tell you the enormity of the power of the jury. Even a stipulation where both sides entered into a stipulation that such and such is the fact, you know a jury is not necessarily bound by it? You can take that stipulation and said "I am not satisfied with it."

Your tongue is not tied, just because there is a stipulation. I am just trying to show you how the law leaves it to the fact finders under their conscience and sense of honor, knowing they would not purposely reject something that they know points in one direction and not another. So I have to tell you what the law is regardless of what the testimony is.

What does the government have to prove beyond a reasonable doubt with regard to the second count? I told you what the government had to prove with regard to the conspiracy. Now, what about count two which I just read to you, what must the government prove?

One, it must prove beyond a reasonable doubt that

on or about January 14, 1975, Brown distributed or possessed with intent to distribute a narcotic drug controlled substance.

Two, that the government must prove beyond a reasonable doubt that he did it unlawfully, wilfully and knowingly; and,

Third, it must prove beyond a reasonable doubt that the substance which Brown distributed or possessed was in fact a narcotic drug controlled substance.

Now, you will note that the first element of the offense is distribution or possession with intent to distribute a narcotic drug controlled substance. What does that phrase mean?

Well, the word distribute means the actual constructive or attempted transfer of a drug.

The word possess has its common, every-day meaning, that is, to have something within your control. And to have something within your control does not necessarily mean to have it in your hand or your pocket. Control may be demonstrated by the existence of a working relationship between the person having such control and the person with actual physical custody.

And the word intent refers to a person's state of mind. And so the phrase "possess with intent to distribute"

can be fairly stated to mean to have control over an item with the purpose that the item be transferred.

On this element the goverment contends that it has proved beyond a reasonable doubt Ralph Brown knowingly transferred the drug and possessed the drug and that at the time he possessed it, his mental state was such that he would transfer it to someone else.

If you find beyond a reasonable doubt that a transfer was made, I charge you that such transfer fully satisfies this requirement of the statute.

As to the second element the term unlawfully, wilfully and knowingly means that you must be satisified beyond a reasonable doubt that the defendant knew what he was doing, and that he did it deliberately and voluntarily, as opposed to mistakenly or accidentally or as a result of some coercion.

Of course, it is not necessary to prove that he knew you was violating any particular law. Rather, it is sufficient if you are convinced beyond a reasonable doubt that he was aware of the general unlawful nature of his acts.

Let's say a few words about knowlege and intent. Since it is not possible to look into a man's mind to see what went on, the only way you have of arriving at a decision on these questions as to intent is for you to take into considera-

tion all the facts and circumstances shown by the evidence, including the exhibits and then to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question.

Direct proof is unnecessary. Knowledge and intent may be inferred, I repeat again, from all the surrounding circumstances, including the use of code words, and an attempt to hide what he was doing to avoid being caught by police officers.

My dear friends, you have had that come up over and over again, even from the time those of you who had children, when you held little Johnny to account, "Didn't you go into the refrigerator and take some jam?" And Johnny says, "No o."

You see a little bit right on his ear. He denies it, but there is some evidence, and before you know it you have a confession. You put things together: he was there, the jam was in the box, there was some evidence, a little bit of jam on him and you conclude and you are satisfied that he was in there and got it. We are making those decisions every day almost.

Of course, you must be convinced beyond a reasonable doubt that the exhibit in evidence is heroin and on that you already have heard what I had to say with regard to the exhibit,

and you may not have any difficulty with that element because it is relatively simple, but it is within your power to scrutinize that and to reject it if you should not be satisfied beyond a reasonable doubt that the substance in question is heroin.

Now we come to what the law has to say with regard to the statement of the defendant. You have heard testimony that the defendant made statements in the presence of, among others, Special Agent Gordon.

If you find that the defendant made these statements, then you may give the statements whatever weight you believe they deserve after considering all the circumstances which were brought out in the evidence.

I would say, ladies and gentlemen, that the greatest challenge -- well, let me say this to you. I think that there is no reason in the world why I should gallop through the balance of this charge and hold up your lunch. It may take me 20 to 25 minutes so I don't think that's essential.

You go along with the marshal and have your lunch and return here at 2:15 and I will finish the charge and then you will go into the jury room to deliberate.

Now, that means that all fourteen of you are to go until I discharge you. You are all to go lunch and you are not to speak about this case and not to say a word with regard

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to it. Remember, the charge is not complete and you have no right to discuss it or say a word about this case, and I know you will not. But I want you to know what is going to happen.

You are going to go now with the marshal and have lunch, come back here at 2:15 and I will complete the charge and you will then enter upon your deliberations. Is that clear? All right.

Swear the marshal.

(Marshal sworn by the clerk.)

THE COURT: Thank you, marshal.

(Luncheon recess taken until 2:15 p.m.)

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AFTERNOON SESSION

2:15 p.m.

THE COURT: I was about to talk to you with regard to the most difficult challenge that any jury has and that is to determine the truth, where does the truth lie?

I told you earlier that this is a pursuit of truth. You have to disregard that which does not appeal to you. A jury has the right to say a witness took the stand with all the dressings and all the imprimatur than can be vested upon a human being, and all the indicia of high office, and I still don't believe him. You have a right to do that.

This little person living in a hut, bearly able to have enough food to keep body and soul together, you know, I kind of have a feeling that fellow spoke the truth. I think he is a man of honor. That is where your strength comes in.

So, that which you don't believe, you spurn, you throw it aside; and that which you do believe, you hold it to yourselves as with hoops of steel. That is what this is, a search for the truth.

Where does the truth lie? Is the defendant, recognizing that the police might very well engulf him as he did sell heroin, has he resorted to a defense of entrapment which is available to him, and has he built a defense of that kind in order to creep away from his responsibility?

Or, on the other hand, is it genuine and is it true and is it solid and is it believeable? That is where you come in. That's not easy, none of fact finding is easy.

As a judge we sit very often as fact finders. We are the jury. Judges have been known to sit in a murder case without a jury and that is where both sides have waived a jury. Aside from that, judges sit most of the time in civil matters, for instance, without a jury and that is by consent of counsel.

The judge becomes the fact finder, has not only to be the judge of the law, but he is the jury, the judge of the facts. And I tell you this from all my years of experience that fact finding is a great deal more difficult than just laying down the law.

I find much more difficult the resolution of a factual issue in a case than finding the law that is applicable to the case. That is the reason I keep talking to you about your great responsibility and that is the reason you are called the ministers of justice.

What's the good of all the law I lay down to you if you haven't got the capacity to detect truth? Because it is on the resolution of the facts and the applicability of the law to the facts that will give substance to your determination, whichever way it is, conviction or acquittal.

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So what has the law to say about witnesses? It is your estimate of the testimony given by the witnesses and each of them that is controlling, not that advanced by the attorneys or suggested by anybody. The attorneys have a right to give you their interpretation of the facts. You, however, are the sole judges as to the facts and the greatest burden you are going to have is to estimate that testimony.

It is not, of course, the larger number of witnesses called by one side as against the number called by the other side that counts. The quality of the proof is really the test.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. In weighing the effect of such a discrepancy, consider whether it pertains to a matter of importance or to an unimportant detail and whether the discrepancy results from innocent error or from wilful falsehood.

If you find that any witness has wilfully testified falsely as to any material fact, you may reject all the testimony of that witness or you may accept such portion or parts which commend itself to your belief.

In sizing them up, in your search for the truth, you should be guided by your plain, every-day common sense. You saw each witness; you observed the manner of his giving

testimony. Out of the welter of testimony you are called upon to determine the factual issues in the case. Thus, upon all the evidence you, the jury, are to resolve the conflicts.

To acquit the defendant you need not find that any witness against him has lied. The test always is, are you satisfied beyond a reasonable doubt from the entire record, in accordance with the court's instructions, of the guilt beyond a reasonable doubt of the defendant on trial?

If upon a cautious and careful examination you are satisfied that the witnesses have given a truthful version, and the government has sustained its burden of proof beyond a reasonable doubt in all other respects as outlined in my instructions, then you have sufficient proof on which to bring in a verdict of guilty.

Otherwise the defendant is entitled to an acquittal.

Your greatest strength, I repeat, is in your common experience with humanity. You determine the value of the testimony of each witness. Ask yourselves as to each witness: "How did his testimony impress me?"

What degree of credit you should give the witness' testimony should be determined by his conduct, his manner of testifying, his relation to the controversy, his bias or impartiality and the reasonableness of his statements. Is the witness interested in the outcome of the case? Is there

a motive to testify falsely? Was the witness mistaken, was he correct?

In other words, what you should do, to use the vernacular, is to size up a person just as you would in any important matter when you are undertaking to determine whether or not a person you are dealing with is truthful, candid and straight forward.

A witness may be discredited or impeached by contradictory evidence that at some other time he has said or done something or failed to do or say anthing which is inconsistent with his present testimony.

The testimony of any witness whose self-interest is regarded convincing to you is to be considered with great caution and weighed with great care. You should consider the witness' intelligence, motive, state of mind and demeanor while on the stand. You should consider his candor, or lack of candor; his possible bias; his means for information, and the accuracy of his recollection.

There is no requirement in the federal court that the testimony of a witness be corroborated, none whatever. Actually the government has a right to call but one witness and that was the witness Gordon. If the government chose to do that, you would be asked to apply the same instructions and you could very well, on the basis of one witness, whether in

this case or any case, decide whether or not you were convinced beyond a reasonable doubt.

The fact that the government saw fit to call Mr. Cunniff or whatever his name was, you remember, the one who was in the panel truck and observed, that really does amount to corroboration of what was done on that particular occasion, as he beheld it, but the law doesn't demand it. The government produced that additional proof for your consideration. I just want you to understand there is no law requiring corroboration.

I might just say, because lay people read a great deal and I want to be sure you understand my point. You read over and over again in rape cases about the need for corroboration, rape cases in the state courts and recently that has all been done away with, so you don't have to have corroboration. Most of the time they found it difficult to get corroboration, so you know what I am talking about when I use the word corroboration. That means supportive proof. There is no requirement in the law that there be such supportive proof.

If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give that witness' testimony such credibility as you think it deserves. Your determination of the credibility of a witness

very largely depends upon the impression the witness made upon you and the conviction with which he testified as to whether or not he was giving an accurate version.

The fact that the witness is an official or an employee of the government does not mean by itself that you should give greater or special credit to his testimony. The testimony of any such witness should be weighed and scrutinized in the same manner as any other witness who has testified in the case.

You judge their testimony in the same way, taking into account interest or any factor which may have influenced them to color or fabricate their testimony.

Now, what does the law say with respect to a defendant who takes the stand? The defendant, under our law, did not have to take the stand. There was no obligation whatever on him or any defendant to take the stand, and if he didn't take the stand, it would have been my duty as a judge to lay down as the law that you could not hold that against the defendant because he did not testify. If you did so, you would be violating your oath.

That's how firm the law is with regard to such an instance. But here the defendant did take the stand. What is the law when a defendant takes the stand?

The law permits but does not require a defendant

to testify in his own behalf. The testimony of this defendant, Brown, is before you. You and only you can determine how much credibility or believability his testimony is entitled to or how little.

I instruct you that it is the law that interest creates a motive to give false testimony. That the greater the interest, the stronger is the temptation and that the interest of a defendant in the result of the trial is of a character possessed by no other witness and is therefore a matter which may affect the credence which shall be given to his testimony. That is the law.

However, let me point out that the fact that a defendant such as this defendant has such an interest in the case does not mean that he will testify falsely. It is for you, the jury, to decide whether he testified truthfully and how much weight to give to his testimony.

You have heard testimony dealing with informants. Well, whether you and I like informants or not is beside the point because the law permits it. Otherwise I wouldn't have allowed a lot of the testimony in the record.

The services of informers are availed of by government agents at times to obtain introductions to persons suspected of violating the law. There are certain types of crimes where, without the use of informants, detection would

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be extremely difficult. Frequently it is necessary to get leads or introductions to persons allegedly engaged in illegal activities or otherwise to aid enforcement officers.

The law from time immemorial has permitted the use of informants provided the rights of a defendant are not violated. So whether or not you approve of the use of an informant in an effort to detect law violation is not to enter into your deliberations.

So, you see, let me grab ahold of these simple examples where I can nail the thought down. I told you what the law is with regard to a defendant who takes the stand, so that if anybody says to you in the course of the deliberations such and such, nevertheless I expect you to say, "But you heard what the judge said as to the law affecting a defendant who has testified."

Or with regard to an informant, someone says in the juryroom, "I despise them, I will not have anything to do with them. I think any informant is inimical to the best interests of humanity. They are a scourge, a curse." All of which may be true, except that you took an oath and that oath compels you to apply the law, and the law is that the testimony or the use of informers is not illegal and is permitted under the law.

Let me tell you, however, that the testimony of an

informer who provides evidence against a defendant for pay or for immunity from punishment or for some personal advantage must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against the defendant.

You scrutinize his testimony with greater care, just as you scrutinize the testimony of a defendant with greater care than you do theordinary witness. Why? Because the law says that he has the greatest interest of any witness and, therefore, the inclination would be to avoid the truth.

Now, let's come to the law with regard to entrapment. It is not difficult to understand. It is plain, ordinary common sense, it is a principle that all of us should understand and appreciate and stand for and believe in, whether we are boy scouts or not. Just listen to it.

The defense of entrapment has been raised. What in the contemplation of the law is entrapment? It is for you and you alone to say what weight you shall give the defendant's claim that he was entrapped.

It is a legal term, it has a technical meaning, not that of popular speech or colloquial useage. Therefore, I have to explain what the law means by entrapment.

The function of law enforcement is not only to

prevent crime, but also the detection and apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. However, criminal activity is such that sometimes stealth and strategy are necessary methods to be used by law enforcement officers.

The defense of entrapment is based upon the policy of the law not to ensnare or entrap innocent persons into the commission of a crime. I repeat, the defense of entrapment is not based upon the policy of the law to ensnare or entrap innocent persons into the commission of a crime.

But a line must be drawn between the entrapment of the unwary innocent and the trap for the unwary criminal. I repeat, a line must be drawn between the entrapment of the unwary innocent and the trap for the unwary criminal.

In this connection I would point out that governmental law enforcement agencies frequently use and avail themselves of the services of undercover investigations in attempting to enforce the laws. The use of such methods is not in any way forbidden by law. I repeat, whether you and I disapprove of that is really beside the point, provided that such services in no way impinge upon the rights of the defendant, because the use of such services is not forbidden by law.

You are not being asked to determine whether or not

you agree with the policy endorsing the use of informers. Please remember, therefore, that law enforcement officials in their efforts to enforce the law and to detect wrongdoing, may resort to traps, decoys and deception. The law recognizes that artifice, strategem and stealth are necessary weapons to apprehend those engaged in or who are about to engage in illegal activities.

A basic feature of entrapment is the idea or design of committing the crimes that originated with a law enforcement officer rather than with a defendant. That the defendant has no previous disposition, no previous intent or purpose to commit the alleged offenses. In other words, to use the vernacular, he was sold a bill of goods, or talked into doing something he had no intention of doing; and that the law enforcement officer or the government employee, which would include an informer, implanted in the mind of an innocent person the disposition to commit the alleged offense and instigated and incited its commission in order that this defendant might be arrested and prosecuted.

Putting it another way, where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officials, acting alone or with private individuals, to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a

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matter of policy will not tolerate employing unfair methods to secure a convicion, and accordingly, forbids a conviction in such a case, even though the criminal charges against him may have been established beyond a reasonable doubt.

Put another way, entrapment occurs when the criminal conduct was the product of the creativity of the law enforcement agent or informant. That is, if they initiate, incite, induce, persuade or lure a person to commit an offense which otherwise he or she would not commit in order that the defendant may be arrested and prosecuted. If that occurs the government may not avail itself of the fruits of such instigating or inducing activities.

With this in mind I charge you if you find from the evidence that the accused was ready and willing to commit a crime such as that charged in the indictment whenever the opportunity was offered and the government merely offered the opportunity, the accused is not entitled to the defense of entrapment.

I go further and say when the government has reasonable grounds for believing that a person is engaged in such of this activity, it is not unlawful entrapment for a government agent to pretend to be someone else and cooperate so to speak or, again using the vernacular, play along with such a person in order that his illegal activities may be possibly

identified for what they are and the offender held accountable under the law.

If, on the other hand, you should find that the accused had no previous interest or purpose or intent to commit any offense of the character here charged and did so only because he was induced or persuaded, talked into it, so to speak, by the agent of the government, or any person acting in its behalf, then the prosecution has seduced that person and the defense of entrapment is a good defense and the jury in that event should acquit the accused.

Now, as to the burden of proof on the issue of entrapment. If you should find there is some evidence of enducement, then the government has the burden of proving that such inducement was not the cause or creator of the crime. In other words, the government must prove that this defendant was ready and willing to commit the offense charged. Have I made that clear? I have repeated it backwards and forwards, the same idea, but it is important that you get it. Again, I say I am encouraged by the nodding of your heads spontaneously and that satisfies me that I need not dwell on entrapment further.

Remember, of course, if at any time when you go into the juryroom you have a disagreement as to the law, or you think someone may not know for sure, why all you do is send a note to the judge and tell me what it is that you want

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to take up by way of any portion of the charge or anything else, that's what we're here for and you are not to hesitate.

Likewise, as counsel on both sides have indicated, if you wish to have testimony read on the facts, you must tell me exactly what it is you want read because remember, the court reporter has to examine the whole testimony to find and dig out things you want, so you have to point to it and make it very clear what you really want and then we will have it read for you.

You are not to hesitate to call upon -- I don't like this business as soon as somebody says something you start to write out a note, so to speak. Don't do that, thrash it out, see where you stand and then if you need help, that's what the judge is here for, that's his job.

Now, I conclude ladies and gentlemen. When I lay down the law, the letter, the spirit of the law, that the defendant is presumed to be innocent until the government fulfills its obligation of proving him guilty beyond a reasonable doubt and all those other propositions of law that I tried to emphasize and to delineate for you, each one equally sacred, remember you must not lose sight of the rights of the other party in this litigation, the government. We must bear in mind, and I so charge you of the equally vital concept of justice defined by the Supreme Court of the United States,

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and hence the law of the land, "Justice though due to the accused is due to the accusor also."

Criminal responsibility is rooted in the individual. His intention, his motive, his conduct. If you find the law has not been violated, you should not hesitate for any reason to return a verdict of not guilty; that would be your sworn obligation.

On the other hand, if you should find the law has been violated, you should not hesitate because of sympathy, or any other reason, to render a verdict of guilty, because in our concept of what is required here, that would be the justice of the case if you so decide it. And if that is your decision, it will also be a clear warning that crimes of this character may not be committed with impunity. The public is entitlted to be assured of that.

Now, as to punishment, I had occasion to mention that before. Under your oath as jurors, you cannot and must not allow consideration of punishment which may be inflicted upon a defendant if he is convicted to influence your verdict in any way. If you did that, you would clearly violate your oath. That duty rests exclusively with the judge who, upon the basis of a full official report dealing with the defendant's general life pattern and behavior, imposes sentence.

The verdict, whether for acquittal or conviction,

must be unanimous. Each juror is entitled to his own opinion. You should, however, exchange views with your fellow jurors, that is the very purpose of jury deliberation. Twelve jurors, not one, not five, seven, eleven. You have a right to your opinion but you must discuss it with one another. You must give each the benefit of your views, and so the law says that you must listen to the arguments of your fellow jurors, must consult with one another and must reach agreement solely and only on the evidence if you can do so without violence to your own individual judgment, and to employ that high degree of genuine courage justice justifiably expects, especially in these perilous times, from your public officials.

You should not hesitate to change an opinion which, upon a consideration of all the evidence with your fellow jurors, appears erroneous.

However, if after a careful consideration of all the evidence and arguments of your fellow jurors, you entertain a consciencious view which differs from others, you are not to yield your convictions simply because youare out numbered or out weighed.

The exhibits and a copy of the indictment will be sent to you promptly.

Your oath, ladies and gentlemen of the jury, sums up your duty and that is, without fear or favor to any man ,

you will well and truly try the issues between this defendant and the United States of America according to the evidence given to you in open court, and the law of the United States, and that's exactly what you swore you would do.

I have every confidence that you will fulfill your sworn obligation as American ministers of justice, to render a true verdict based solely and exclusively upon the facts and on the law in this case.

If the government has carried its burden in accordance with the evidence and the law as to the defendant, you must not flinch from your sworn duty, you must convict.

But if it has failed to carry its burden as to the defendant, your sworn duty is to acquit.

What is expected of you is what I told you about Mr. Justice Jackson, you call them as you see them, as they come across the plate. And this I say with measured tones. You have undoubtedly talked about justice in your own homes, and in your daily affairs, in your comings and your goings, as is your inalienable right. The point is that now each one of you sits in the seat of justice. How will you do?

Apply your criticism to yourselves, and will you call them as you see them? Will you do justice as between the government on the one side and the defendant on the other, solely on the facts and on the law? Will you inject that

which doesn't belong? Will you a' w factors that have no place in this search for the truth to prevail? Will you do honor to your oath as you expect the judge to do with respect to his? This judge has every confidence that you will do exactly that, that you will do honor to your oath and that you will fulfill your mission.

If you will be good enough for a moment or two and just keep your seats, I want to confer with counsel. But I want to say something that occurred not long ago and prompts this point as that is this: that juryroom is your juryroom. No one -- judge, lawyer, public official -- has the right to enter. If you want something, wrap on the door and the marshal will be there to take your message or do whatever you wish. You will find our marshals are wonderful people and I have great pride in them. But the point is, it is nobody's business what goes on in that room, that is your business. No one has the right to know what it is that enters into your debate and how you go about fulfilling your function. So just remember that.

There was an episode where somebody just barged right in and the jury thought that person had a right to be there. Nobody has a right to be there, only you, the ministers of justice.

Will you keep your seats, all of you and I ask that

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counsel and the court reporter be good enough to join me in the robing room.

(The following took place in the robing room.)

THE COURT: Gentlemen, any exceptions or requests? First from the government.

MR. BLOCK: No exceptions your Honor and no additional requests.

THE COURT: Mr. Concannon?

MR. CONCANNON: Nothing, your Honor.

THE COURT: All right, let's go right out.

(In open court.)

THE COURT: Mr. Clerk, will you please proceed.

(Alternates excused.)

(Jury retired to deliberate at 3:05 p.m.)

(Note received from the jury at 4:25 p.m., marked as court exhibit 1 for identification.)

xxx

THE COURT: Counsel, there is a note from the jury which has been marked as court exhibit one for identification which reads as follows:

"In Mr. Gordon's testimony how did he say the defendant and Kayo were introduced to him. Did Gordon ever hear Brown refer to Kayo or vice versa as his 'partner'"?

As I gather it, through your good offices counsel on both sides have, with our good court reporter, found the

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testimony of Mr. Gordon, the witness, and that answers the first part of the jury's note.

MR. BLOCK: That's correct.

THE COURT: Then, as I understand it, you are agreed that no where in Agent Gordon's testimony was the word "partner" used, it does not appear in his testimony?

I don't think we need to say anything about Brown or Kayo. The word does not appear in the entire testimony of the witness Gordon.

MR. CONCANNON: Thank you, that is fine.

MR. BLOCK: That is agreeable.

THE COURT: Bring in the jury.

(Jury returned to the courtroom at 4:45 p.m.)

THE COURT: Thank you for your note. I think we can deal with it.

YOur note reads as follows:

"In Mr. Gordon's testimony how did he say that the defendant and Kayo were introduced to him? Did Gordon ever hear Brown refer to Kayo or vice versa as his partner?

We will take up, ladies and gentlemen, the two parts of your note. The first part is, "In Mr. Gordon's testimony how did he say that the defendant and Kayo were introduced to him?"

Now the court reporter will read to you what

Gordon's testimony reveals with respect to your question, and everyone agress, that is, the lawyers and the judge, that all that was said by Gordon, whatever you are going to hear now, is what was said on the point.

(Testimony read as requested.)

THE COURT: We come to the second part of your note: "Did Gordon ever hear Brown refer to Kayo or vice versa as his partner?"

Counsel agree and the court reporter, having examined Gordon's testimony agrees, that Gordon didn't use the word "partner" in connection with anything or anybody.

THE FORELADY: Thank you.

THE COURT: Thank you. Take the jury, please.

(Jury left the courtroom at 4:50 p.m.)

(Note received from the jury at 5:35 p.m., marked as Court exhibit No. 2 for identification.)

xxx

(The following took place in the robing room.)

THE COURT: There has been an off the record discussion during the last ten minutes, approximately that, with regard to a note received from the jury at 5:35 p.m., which has been marked as court exhibit No. 2 for identification and reads:

"Is the entrapment defense for conspiracy? I.E., if we feel there was entrapment, does it necessarily follow

that we must acquit on conspiracy? Since no partnership would have been formed were it not for this 'deal'. Are these charges completely separate?"

Counsel are not certain as to how we should answer it. I have suggested that in view of the fact that it is now about five minutes to six, that by the time we give them an answer and allow them to contemplate on it and apply it in their deliberations, it is going to be right into the dinner hour; they have yet to go home, it is getting dark here and we are agreed they should go home, returning tomorrow, and, in addition, make clearer their note because counsel are not certain as to what they mean by "deal".

So we are going to call in the jury, tell them in essence we think it best to do this at this late hour. They will re-write the note, either now or tomorrow and make more clear to us what it is they mean by that word "deal".

Have I stated in essence what we have decided it would be best to do at this juncture? What does the government say?

MR. BLOCK: I concur.

MR. CONCANNON: Your Honor, do I understand you intend to suspend for tonight and ask them to redefine deal?

THE COURT: Redefine it in the morning.

MR. CONCANNON: I think that would be acceptable,

except that I still think that an effort should be made to answer their question before we pose one to them. In order words, I think that if they are to be sent home, they should be sent and told we will make an effort to answer their question in the morning and if our answer is not responsive, I think they will let us know. But I don't think that we should --

THE COURT: To re-write and make it clear?

MR. CONCANNON: Yes.

THE COURT: Even though you are not sure what they mean by the word deal?

MR. CONCANNON: I think I indicated I suspect what they are trying to do is refine or indicate otherwise, having asked the first question.

THE COURT: What I said on the record meets with your approval as I take it, except you do not feel there is any need to ask them to re-write their note?

MR. CONCANNON: I don't think we should ask them to re-write the note.

MR. BLOCK: Might I say something else? If you decide to ask the jury to re-write the note, it might be preferrable for us to give them an opportunity tonight so the rewritten note could guide us in whatever research we could no tonight.

THE COURT: Very well, gentlemen. Call the jury in. Thank you.

(Jury returned to the courtroom at 5:55 p.m.)

THE COURT: Ladies and gentlemen of the jury, we have your note and it is a sensible note. It is a sensible request.

You are seeking instructions from the court and the thing that bothers us is that it is now almost six o'clock. By the time I give you instructions with regard to your note and you begin to apply that and deliberate upon it, apply it to your discussions and facts and so forth, you are going to be into a late hour for dinner and, therefore, I want to be practical about it.

I think you all ought to go home and return tomorrow and continue with your deliberations. We are troubled by a word in your note and the first thing you should do tomorrow morning is redraft this note to make the word clear, or I prefer, if you can possibly do it now, to straighten out your note. It uses the word "deal" and we don't quite understand what you mean. We want to be completely sure and I don't want to guess. I want your note to be very clear. Here is what you say: "i.e. if we feel there was entrapment, does it necessarily follow that we must acquit on conspiracy since no partnership would have been formed were it not for

this 'deal'".

We don't quite understand what you mean. Don't talk, just re-write your note and re-write it now so that we can understand what you are after, and then you go on home.

We will take your note and we will study it and work on it and see whether we can come up with the answer that your note calls for. But we should be mighty sure what it is you are asking us to do, what you are trying to elicit and that word troubles us a bit so we are not sure.

Re-write your note, hand it in if you don't mind before you go, and return tomorrow morning. I won't be able to be here before 11 o'clock. You be here at 11 o'clock tomorrow and we will be ready to answer your note. Then you continue with your deliberations.

One other thing I do not like is a late hour when people have to be going home, when there are folks they have to take care of and rushing it through. I don't like that. You have asked a question, at least we get the essense of it, of what you are after and you are entitled to an answer and an explanation and I don't like the idea of rushing in there and seeing the hour and that kind of pressure. I don't think it goes with the doing of justice.

You ought to take your time. You had the charge here from the judge and you have been working at this since

the end of the charge. So for all those reasons, don't you think it best, this suggestion I make.

So go and send me a note that explains a little better what it is that you are after. In fact, you don't have to explain anything except what you meant by the word 'deal'. Make that clear to us.

We understand what you mean when you say "is the entrapment a defense for conspiracy"?, that is a clear-cut question, no doubt about what you are asking there.

When you say, i.e. if we feel there was entrapment, does it necessarily follow that we must acquit on conspiracy since no partnership would have been formed were it not for this deal. Are these charges completely separate?"

I can't answer that right now. They are two separate charges, one is conspiracy which I explained to you, and the other is the actual performance, carrying out one of the objectives of the conspiracy, which was to distribute or possess with intent to distribute the narcotic drug, heroin.

Do you remember the bank example? One was the planning of the bank robbery, the other was the robbery itself. Here one was the charge of conspiracy, that they got together to violate the federal law dealing with the distribution or possession with intent to distribute narcotics, which was prohibited by law. So that one is the conspiracy. And the

other is actually carrying it out, in that particular instance.

So you nod your heads and I am glad you got that. So they are two separate charges. You have to return a verdict on each one. On conspiracy, guilty or not guilty. On count two, guilty or not guilty. As simple as that. So they are two separate charges.

Sure the evidence in one may be applied with regard to the second count. Certainly the evidence on both can be considered with respect to your determination of each count. It is not boxed in. You can take the total evidence from beginning to end, and the entire case, and ask yourselves on the total trial record -- you know what I mean by that, I defined that for you, everything that went into the record, the evidence, the exhibits, stipulations, the charge of the judge on everything -- am I satisfied that this defendant was a willing, knowing conspirator in a conspiracy, as the judge told us what the law is on conspiracy and what must be proven beyond a reasonable doubt.

When you resolve that, you take up the other, am I satisfied beyond a reasonable doubt that on or about such and such a date, the defendant did possess with intent to distribute heroin? The judge told us what the elements are, what must be proven beyond a reasonable doubt as to conspiracy, what must be proven beyond a reasonable doubt as to count two.

But in each instance, you take the entire record and ask yourselves whether you are satisfied beyond a reasonable doubt that the guilt of the defendant has been established as to each count.

You nod your heads, Ihope you mean by this nodding that you understand what it means. If you don't, if you are not sure, you add on all the notes you want. That's what we are here for. But for the time being, won't you be good enough to address yourselves to this one point with regard to what is meant by the word "deal". Straighten that out and we will try to see if we can understand what it is you are trying to say to us and we will be ready to give you the answer tomorrow morning.

Does that sound all right? Very well, suppose you retire and I will give you back the note you sent marked as court exhibit No. 2 for identification. That might help you in trying to clear up what that word deal means, what you are trying to say to us. Take your time.

(Jury left the courtroom at 6:05 p.m.)

MR. CONCANNON: Your Honor, I do object to your Honor answering the second or latter part of the jury's second question, particularly because I think that it does not get to the thrust of the question, which is the thrust of Mr. Brown's defense that he was entrapped and would not have been

in this courtroom for each of the charges but for the fact that he was entrapped. I believe that in answering the second part of the question the way your Honor did, you separated the charges which are indeed separate, in a way, because of its relationship to the rest of the question, which was to let it go unanswered in a way, which is prejudicial to Mr. Brown.

THE COURT: Does the government have anything to say. I will give the government an opportunity. I don't want to make you say anything if you don't want to,but the record will reveal that you were given an opportunity to say anything if you wanted.

MR. BLOCK: Nothing at this time.

THE COURT: Very well.

(Note received from the jury at 6:20 p.m., marked court exhibit No. 3 for identification.)

xxxx

(In the robing room.)

THE COURT: The jury sent a note at 6:20 p.m., having gone home after sending in what I just received, a piece of paper on which appears the following:

"Deal" --initial conversation between Morris and Brown." That is all that appears.

I am going to let you take it and I suggest, gentlemen, the lawyers on both sides -- that is court exhibit

No. 2, the note we discussed before and which I read to the jury and I turn over to you the latter note, take both of them, make copies, return both to me tomorrow and be prepared when we get together to give me the benefit of your reflection.

There it is, all right? I see no sense in accepting an off the top of your head kind of thinking. I want a thorough analysis of it. I direct both of you to do the spade work and I want something beyond a spur of the moment initial reaction, especially since I was here when you expressed yourself off the record and to my mind that left a great deal to be desired as far as certainty was concerned. I don't see how anybody could be certain at this juncture. So there it is.

MR. CONCANNON: Your Honor, may I just say that in my summation I did indicate that the jury should not make an election. If they did believe our defense of entrapment as raised, they should acquit him on both, and if they did not, they should convict him on both.

THE COURT: What do you want me to do about that?

MR. CONCANNON: Nothing, your Honor.

THE COURT: That doesn't help me resolve what to do with these notes.

MR. CONCANNON: Your Honor, I think --

THE COURT: That's enough. The court made a direction, go and do some work.

(Adjourned to February 5, 1976 at 11 a.m.)

UNITED STATES OF AMERICA

vs. 75 Cr. 1126

RALPH BROWN.

New York, February 5, 1976;
11.00 o'clock a.m.

(Trial resumed.)

- -

(Jury not present.)

THE COURT: Gentlemen, I will hear you with regard to the issue that was left with you when we adjourned after six yesterday.

What does the Government have to say?

MR. BLOCK: Your Honor, following your direction that we think about it and do whatever was appropriate in the library, I did spend several hours last night together with Mr. Gold and consulted personnel in our office and the first thing that appears evident after thinking about the notes is that the jury is confused and has misapprehended your Honor's instruction concerning entrapment.

The note appears to equate entrapment with inducement and so that may account in part for why at first we had some difficulty, all of us I mean by that, in understanding what the jury was asking instructions about.

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So with respect to that, we believe it would be appropriate for your Honor to give the jury an additional instruction concerning entrapment and perhaps some slight modifications using the language that Mr. Concannon had provided in his proposed charge. If your Honor would do that, the Government would have no objection if that language were used with respect to entrapment. I mean, in his request for entrapment.

THE COURT: What is there that we didn't bring to the attention of the jury?

MR. BLOCK: I don't know that there is anything that your Honor didn't bring to their attention in that charge. I am just suggesting an alternative since they didn't seem to get it the first time.

THE COURT: All right, I see.

MR. BLOCK: If I may continue, in particular I think the aspect of the entrapment charge for which an additional instruction should be given is the notion of inducement that the jury's duty or responsibility is to establish or find, one, whether or not there was inducement from the Government agent and, No. 2, as a factual matter what the inducement was; and, three, whether that inducement is overborne by the Government's proof of the defendant's previous disposition to do that which he was induced

to do.

And, further, that the jury be instructed that that is an analysis that they must undertake separately with respect to the substantive offense and separately with respect to the conspiracy offense and that a finding by them that there was entrapment, using that particular word with respect to, say, the substantive offense does not require that they make a similar conclusion or reach a similar conclusion with respect to the conspiracy offense.

Particularly since the acts for which there has been proof in the record and for which the defendant can be held responsible for the conspiracy charge, are much broader than that which relates to the substantive offense, including, chronologically, when these acts occurred.

As I understand the defense claim and the jury's note, since they define the deal to be the initial conversation between Morris and Brown, now I am speculating but doing so only for purpose of an example, the jury might be troubled by what it was that they might find, the defendant obtainted the heroin on January 14, bringing it with him to the car and passing it to the agent and receiving $1400.

But they may find that at some point, in the

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car or after he left the car, some point that day, he saw this as an easy way to make money and wanted to do it again and didn't have to be induced by anything the Government did to do it again and I just suggest again by way of the testimony they heard there on the occasion, when the transaction was concluded the defendant said, "I can get you up to one kilogram with no problem at all."

That might be something they are hanging on and I wasn't able to find any direct authorities for the proposition that when there are multiple counts in an indictment and the defense of entrapment is affirmatively raised, the jury should be directed to analyze the claimed inducement and claimed previous disposition with respect to each offense but there is a case, a recent case in the Third Circuit which absent any case in this Circuit -- I couldn't find any which had anything to say on the issue -- U.S. against West, 511 Fed. Reporter 2d, 1083, an opinion by Judge Hastie, concurred in by Judge Gibbons and a dissent by Judge Weiss, though I might point out that Judge Weiss in his dissent in effect concurred with the majority.

There that was a three-count indictment against the defendant, the first two counts were for distribution of heroin and the third count was for possession of heroin

with intent to distribute. Each on different days and a different amount of heroin.

It was a bench trial and after trial and after evidence concerning entrapment came in, the trial Judge found the defendant guilty on all three counts.

There was an appeal taken to the Court of Appeals and there the majority concluded that the evidence was undisputed with respect to Counts 1 and 2, that the defendant was induced to distribute the heroin by the Government activity.

In particular, they found that the evidence showed that the Government sent an informer to the defendant and had the informer persuade the defendant that the informer and the defendant would sell heroin to someone acquainted with the informer, who turned out to be an undercover agent.

In effect, the Government manufactured the crime. There, at least that was all the evidence showed; no rebuttal evidence of any kind.

THE COURT: So what did they do on the third count?

MR. BLOCK: Where there was no evidence that the Government, the source of the heroin was the Government, the Third Circuit allowed the conviction on that count to

stand.

THE COURT: So your argument is that that case stands for the proposition that entrapment is a good defense to each count separately?

MR. BLOCK: That is correct.

THE COURT: And that a finding of entrapment as to one, tha doesn't entitle you to say that that finding seeps through into other counts, is that what you are saying?

MR. BLOCK: That is correct. And the fact there were three offenses were committed within the same relatively short period of time as the proof showed, the three days on which the defendant went out and either procured or attempted to procure heroin in our case.

THE COURT: Anything else?

MR. BLOCK: I don't believe so.

THE COURT: Mr. Concannon?

MR. CONCANNON: Your Honor, I think this is all becoming enormously more complex than it should be.

The Government has the same obligation as I do to prevent error from creeping into this record and your Honor's dependence upon West, I think will have us running into all kinds of difficulty.

THE COURT: What is that?

MR. CONCANNON: Your Honor's dependence, should you adopt the remedies in the West case will I think attract that kind of error I am talking about.

The West case involved some things which the Government hasn't entirely indicated, suggesting that these matters were entirely separate, your Honor.

First of all, the Government undisputedly was the source of heroin for Counts 1 and 2. The heroin relating to Count No. 3, the defendant testified he didn't know how it got down into the car, unlike the other two amounts which he certainly received from the Government agents.

In addition, there was testimony evidently at the trail that West himself, the defendant, indicated that he was on his way in an attempt to drop off two packages of heroin, namely packages No. 1 and No. 2, again indicating that No. 3 was an entirely separate affair.

Now, the Government approached this trial with a theory that there was a conspiracy between Kayo and my client, Ralph Brown and, indeed, others unknown as your Honor frequently sees that language. In essence, one theory there is a conspiracy, certainly being a separate offense, but the gravamen of the offense was the dis-

tribution on the 14th which is what all the overt acts indicate, it was one, this one gravamen that I raised in my defense. Indeed they are separate offenses but if you believe the defense of entrapment it is for both of them, he is either innocent or guilty On both of them.

In your Honor's charge to the jury in which you described the separateness of conspircy and the separateness of conspiracy and the substantive offense, you by way of example indicated that a man or men may concoct a plan for a bank robbery and plan on it. That if they take some action --

THE COURT: Don't tell me my own example. What is your point?

MR. CONCANNON: That that is all one package and that I have no objections to your Honor charging in answer to the jury's question, No. 1, as to the conspiracy I think the answer is yes.

In answer to question No. 2, are they separate offenses, the answer is yes.

And in answer to question No. 3 read in substance the charge but indicate these are separate propositions that the jurors may not speculate why the defense did not approach this from this angle, that would be unfair to the defendant because it is showing another

angle that the prosecution didn't consider, the prosecution didn't present, that in our attempts to advance a new theory or evidence of confusion when in essence they are asking a very simple proposition. And this is getting back to the idea that this is becoming enormously complex when it need not be.

Again and most important, this is not the end of the line. The simple way is if the answer to the question is unsatisfactory, the jurors can then ask another one and we lose nothing. If you say yes to 1 and yes to 3 the way you already have and give the substance of that charge concerning the second question, if that is not satisfactory they can ask another one.

THE COURT: What do you suggest that I should do with respect to the second, what you call the second sentence, do what?

MR. CONCANNON: Charges I requested and that the Government agreed you should charge with respect to entrapment.

THE COURT: I shall go into the issue of entrapment again?

MR. CONCANNON: Yes.

THE COURT: I have charged them on entrapment.

MR. CONCANNON: Yes, you should say that we

gather from your note that there is some confusion concerning the essentials of the defense of entrapment and in that connection I will give you these additional instructions, the substance of what you have already given in your charge.

This is just a different way of putting it, possibly defining it a little differently and in essence the Government and I agreed in the robing room with your Honor before you gave the charge that it was satisfactory to us then. If the Government now asks you for something there may be a reason for confusion if they want some additional charge beyond Judge Weinfeld's charge on entrapment, suggesting that as a different dimension to this whole case; that these things should be treated so separately that the jury could calculate both the prosecution and the defense angle in a way which was intended by neither litigant in this trial, approached by neither litigant.

In opening statements or summations we gave your Honor no hint about these angles so that you could prepare for it in your charge and the only safe way is to give yes on 1 and 3 and No. 2 give the charge as we agreed it should be.

THE COURT: Thank you.

MR. BLOCK: Your Honor, I would like to say one thing.

I don't think the issue here is whether the Government or Mr. Concannon anticipated the difficulties that the jurors are having, any difficulty or the particular difficulty. I point out that, as I reread Mr. Concannon's proposed charge last night, it doesn't say that the -- or didn't ask your Honor to charge entrapment on a defense to the substantive offense but doesn't ask that you charge the entrapment defense as to conspiracy. In fact I believe there are certain points in the proposed charge, it speaks of entrapment and as a defense to the crime.

THE COURT: So your point is you don't want me to read his request on entrapment?

MR. BLOCK: My point was more in response to what Mr. Concannon said that the Government is foreclosed from asking your Honor to instruct the jury in response to what he calls the second sentence here. That it is not an all or nothing proposition.

THE COURT: All right.

Gentlemen, I thank you for the efforts that you have apparently expended but I must say that unless I am entirely wrong, you have missed a crucial, overwhelming indispensable point. Both of you have overlooked it.

Entrapment can only be asserted where there has been an admission of doing the act. The proof here is that the defendant admitted Count 2 but created the defense of entrapment. He denied the conspiracy; he never admitted the conspiracy.

You can't have the entrapment without admission. The whole purpose of entrapment is, yes, I did these things, I stole, I sold drugs, I carried stolen securities knowing they were stolen but, in each instance, I was entrapped. I admit I did these things. I can tell you I was entrapped and, therefore, I am released under the law. Without that entrapment I would be guilty.

Now, did you see that discussion of entrapment in the cases, Mr. Block?

MR. BLOCK: Your Honor, I did and may I address that point?

THE COURT: Sure.

MR. BLOCK: Yesterday after --

THE COURT: Come to the point.

MR. BLOCK: May I have the reporter read that back to your Honor --

THE COURT: Give it to me now, what is your answer right now to my point?

MR. BLOCK: I am not certain that Mr. Brown

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didn't admit that he entered the conspiracy with Kayo.

THE COURT: For heaven's sake, no, you can't contend that at all. I will tell the jury if they find that he admitted it, then the defense of entrapment is applicable.

MR. BLOCK: Satisfactory.

THE COURT: If he didn't admit it this defense of entrapment is not applicable.

What do you say, Mr. Concannon?

MR. CONCANNON: Your Honor, there is absolutely no question in my mind, that in my recollection, that Mr. Brown admitted doing almost every single thing the Government asked.

Your Honor's point is that I didn't ask him whether or not he conspired, there is no question that he admitted it and if you charge as indicated, then I request an indication in the charge that he has admitted this conspiracy. I am entitled to that charge.

THE COURT: No, I won't tell them he admitted any such thing. If they find he admitted then this entrapment applies. If he didn't admit it then it does not apply. Entrapment goes to each count separately.

The fact that there is entrapment as to one count, it does not follow that entrapment ensues as to the

other count. They have to weigh entrapment with respect to each count separately.

What is wrong with what I just said?

MR. BLOCK: Nothing wrong, your Honor.

MR. CONCANNON: It is wrong, your Honor.

THE COURT: Why?

MR. CONCANNON: It is wrong to give the charge without that indication. The defendant was not questioned and he admitted he entered the conspiracy and now you are raising the question as to whether or not he admitted it by presenting the question in that fashion to the jury. It is unfair to him.

THE COURT: All right. You have never admitted the conspiracy. You addressed your remarks to the substantive act and to stand there and say to me that this defendant got on the stand and admitted the conspiracy and have the Government say that he may have attempted to do so is astonishing to me.

MR. CONCANNON: I walked in front of the jury and said that there was no question abut the conspiracy, no question about the purchase, no question about the transfer. I did not say that he admitted the conspiracy. That is a conclusory determination that should be left to your Honor's charge, which is what we did.

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If you are asking if I had backed up and anticipated these things and asked you to indicate for the record what you were going to say, I certainly didn't do that. But I would like to know and I ask your Honor to indicate for the record where in Mr. Brown's testimony he denied any elements of the conspiracy.

THE COURT: I don't have to answer you, I don't intend to. You were here and so was I. You heard his testimony. I am astonished at the Government, and two of them are here. You tell me that you got the impression too? Maybe I am wrong.

MR. BLOCK: May I say something?

THE COURT: Well, say it.

MR. BLOCK: I didn't put the question direct to him but the trust of his testimony is that he exculpated Kayo by saying that just innocently his friend was present. He did not say that Kayo was there to participate in the narcotic transaction.

THE COURT: That doesn't make a denial of the conspiracy.

MR. BLOCK: No, but it does not make it an affirmation either.

THE COURT: That is a fact question for the jury.

All right, take a few minutes' recess.

(Recess.)

THE COURT: After further reflection I am content that what the Judge should do under these circumstances, bearing in mind the totality of the record and the charge by the Court and the note that we have been considering, that what we should do is, No. 1, make it clear to them that entrapment is a defense only where the act charged is admitted and that there is a difference of opinion as to whether there was an admission as to the conspiracy.

We have it as a clear admission as to the second count. If you find, ladies and gentlemen, that the Government has proven beyond a reasonable doubt each of the elements requisite as I defined it to you yesterday and proved each element beyond a reasonable doubt, then you consider whether or not the defense of entrapment may be established.

That is based if you conclude, if you do, that the charge, Count 1, the conspiracy count has been proven. If you find, if it is your conclusion there was no admission by the defendant that he conspired as charged, then the defense of entrapment is not applicable since entrapment is a defense that can be raised only after a

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defendant admits committing the act charged.

Then you go to Count 2 -- we don't care whether you go to Count 1 first or Count 2 first, that is for you to decide. All we want to emphasize is that you must consider each count separately based, as I told you yesterday, on the entire trial record to determine whether or not guilt has been established beyond a reasonable doubt.

When you come to Count 2 you consider the entire record again and ask yourselves whether those elements have been spelled out or proven beyond a reasonable doubt and, if you find they have, and you conclude as I think it is quite clear there was an admission by the defendant, then you ask yourselves whether as to that count entrapment has been established.

If you find it has, you acquit him. That is it.

I see no reason to reconsider or add anything further or try to go into any delicate nuances.

I don't want to start to spell it out so that it may prove to be disastrous for either side.

The moment you begin to get into hairline distinctions you are pretty much telling the jury which way to find. As I refined this, it can only be adverse to the defense. The more I go into the conduct of inducement and

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the wearing down of a person, the more it would seem to me I would be refining it to the point where they might very well resolve that the refined terminology of the Judge or the test on these hairline distinctions was something they are not convinced of.

So I don't want to charge on something that they are clear about. I don't want to join in your interpretation of the note to the extent that you believe that there is uncertainty in their mind as to the meaning of entrapment.

Gentlemen, that is what I propose doing. The defense objects and the record will so reflect.

MR. CONCANNON: I have an additional objection.

Your Honor, when Mr. Brown takes the stand and admits Count No. 2 and the essential elements he is necessarily admitting the conspiracy, which is what I want to make clear for the record.

Secondly, if your reading of the law is accurate, it would require that the defendant take the stand to make out what he must make out in order to raise the defense of entrapment, which is not the case. The defendant could raise the defense to the Government agents or on the basis of cross-examination, without ever taking the stand and making an admission or denial.

THE COURT: I didn't say that at all. I didn't say that he had to take the stand at all.

MR. CONCANNON: Your Honor was saying that he had to make the admission.

THE COURT: If you are maintaining the only way the defendant can make an admission is by taking the stand then you better go back and take a refresher course. There are other ways by which an admission by a defendant can be overwhelmingly established without the defendant taking the stand.

However, that is what I am going to do.

Bring in the jury.

MR. CONCANNON: Will your Honor indicate that Mr. Brown raised the defense of entrapment with respect to each count?

THE COURT: Yes.

(Jury returned to the courtroom at 12.05 p.m.)

THE COURT: I am sorry to have kept you waiting but there was a discussion that came up with regard to your question. I told you yesterday that it was a good question and you were entitled to an answer and we will endeavor to answer it.

You undoubtedly got the general impression from

my charge as to entrapment that it is a defense raised where a person charged with a crime says in effect, yes, I did do all those steps that spell out the doing of a crime but I want you to know that I want to add the defense of entrapment.

Hence, it is that when the defendant went on the stand you heard his testimony, you heard what he admitted and what he denied. There seems to be some disagreement between us as to whether or not the defendant admitted the conspiracy. It is clear that he admitted the second count.

If you conclude that he admitted the conspiracy, then you apply the defense of entrapment, because you don't apply entrapment if a man denies he did something, only when he admits he did it.

Do you get the point?

JUROR NO. 9: I do, sir.

THE COURT: Here is the language of the law.

A defendant's testimony to the effect that he did not commit the crime cannot raise an issue of entrapment. That is the law I am charging you. I repeat it again:

A defendant's claim to the effect that he did not commit the crime cannot raise an issue of entrapment.

Have you got that? Anybody fail to get it?

Now, suppose you conclude that he did admit the conspiracy or conspired. Then you apply the defense of entrapment the way you applied it in the second count on which we are all agreed that he did admit doing or committing that substantive act charged in Count 2. But he says I admit it but I was entrapped.

Don't you see, in essence entrapment can be considered by you as a defense to each count separately?

Suppose, for example, you decide that he did admit in essence that he admitted the conspiracy. Then he is entitled to the defense of entrapment, right? Am I getting through to you so far?

You take the whole trial record, everything that happened before you, the stipulations, the exhibits, everything else, and you decide on Count 1 did the Government establish the charge in Count 1, the conspiracy, beyond a reasonable doubt?

Did the defendant admit what you are convinced of, that he did conspire, that the charge has been sustained in Count 1?

Well, you apply the defense of entrapment and are you satisfied from the totality of the evidence that he was entrapped? And if you are satisfied, out, he

is acquitted of Count 1.

Then you pick up Count 2 and you ask yourselves what about this? The Judge told us what elements must be established, each of which must be established beyond a reasonable doubt as to Count 2.

Are we satisfied beyond a reasonable doubt as to each one of those elements that must be proven in Count 2?

Suppose you decide that you are satisfied beyond a reasonable doubt, you don't have to ask yourselves whether or not he admitted Count 2, because we are all agreed that he did. You may be equally convinced with regard to Count 1.

But in considering Count 2 now, it is another case, another deal, another proposition, another separate act. It is another matter that you can consider using the same evidence, of course.

So you pick up that whole record again and pick up all the stipulations again and pick up everything in the total record again, including the Judge's charge and, you say, am I convinced beyond a reasonable doubt that he committed Count 2?

Suppose you say yes? Then you go to the question, what about entrapment? If you are convinced

that the defendant was entrapped with regard to Count 2, out goes the case.

If you are not convinced, then you disregard what he asserts as to entrapment as to Count 2.

You may, for instance, find entrapment as to one count and not as to the other. Do you understand that?

You look, some of you look and it makes me feel that you do understand and some others are making faces, I can't tell. So I am going to call on each one of you. If it isn't that clear, you demand from the Judge that he make it clear.

I think that was the indication of what I said to you at the closing hours yesterday, that the two cases are separate, two separate charges. He can be guilty of neither one, found guilty of both, he can be found guilty of one and acquitted on the other.

Now, Miss Bender, do you think that answers the jury's note, all that the jury wanted of me when you handed up the note?

THE FORELADY: I think so.

THE COURT: Mr. Lichterman, have I made that perfectly clear?

JUROR NO. 2: Yes, your Honor.

THE COURT: Has the jury note at the close of yesterday been answered to your satisfaction?

JUROR NO. 2: Right.

THE COURT: Mr. Curian, is that clear to you?

JUROR NO. 3: Yes, sir.

THE COURT: Mr. Keys, are you satisfied that you understand it backwards and forwards?

JUROR NO. 4: Yes, sir.

THE COURT: Mr. Ildefonso, is that clear?

JUROR NO. 5: Yes, sir.

THE COURT: As clear as possible to you?

JUROR NO. 5: Yes, sir.

THE COURT: Do you think there is any doubt at all about what I said?

JUROR NO. 5: No, sir.

THE COURT: Do you believe that is an answer to what you wanted to know by the jury note?

JUROR NO. 5: Yes, sir.

THE COURT: Mr. Case, is that clear as clear can be that I have answered what you had in mind or what the jury wanted to know by its note yesterday.

JUROR NO. 6: Yes, sir, I think so.

THE COURT: Is there any doubt about it. When you say that does that mean that you are not too sure?

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JUROR NO. 6: Well, I think I understand it pretty good.

THE COURT: What doubt lingers in your mind? Is there any doubt about what I have said?

JUROR NO. 6: No.

THE COURT: You understood what I said?

JUROR NO. 6: I understood what you said, yes. I understand what you say.

THE COURT: That is all I am asking, not what you are going to think about it or what you are going to do. All I want to know is whether you understand what I just said to you.

JUROR NO. 6: I understand that.

THE COURT: During the last ten minutes.

JUROR NO. 6: I understood that.

Mrs. Sottolano, do you feel that I have made that clear?

JUROR NO. 7: Yes, sir.

THE COURT: Miss Rauchweiger?

JUROR NO. 8: It is clear, sir.

THE COURT: Mr. Loew, have you any doubt at all as to what I said?

JUROR NO. 9: It is clear now.

THE COURT: Miss Goldberg, is it clear to you?

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JUROR NO. 10: Yes, sir, it is.

THE COURT: Do you believe that answers the jury's note?

JUROR NO. 10: Yes, sir.

THE COURT: Mrs. Sullivan, what do you say?

JUROR NO. 11: I believe I understand it now.

THE COURT: Have I answered the note?

JUROR NO. 11: Yes, you have.

THE COURT: Mr. Cordon, what do you say, sir, are you satisfied that you understand everything that I said?

JUROR NO. 12: It is quite clear.

THE COURT: Very well.

Have I answered the questions of the jury posed to the Court, Mr. Gordon?

MR. GORDON: Yes, sir.

THE COURT: Thank you.

Please continue with your deliberations.

(Jury left the courtroom at 12.20 p.m.)

THE COURT: Any comment with regard to what the Court just said?

MR. BLOCK: Your Honor, what you said is wholly satisfactory to the Government.

THE COURT: Mr. Concannon?

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MR. CONCANNON: I don't mean to delay things further but naturally I am concerned about the indication that there is some doubt in the Circuit as well as here about whether or not there is an admission to the first count.

THE COURT: You said that before.

MR. CONCANNON: The balance, your Honor, I will rest on what --

THE COURT: On what you advanced before.

MR. CONCANNON: Thank you.

THE COURT: Gentlemen, I read to the jury the law as laid down as we understand the defendant's testimony to the effect that he did not commit the crime and cannot raise the issue of entrapment was from Sylvia against the United States, U. S. 63, Circuit Court of Appeals, Massachusetts, 312, Fed. 2d 145 cert denied, 374 U.S.890.

(Jury returned to the courtroom at 2.40 p.m.)

THE CLERK: Please answer as your name is called.

(All jurors present.)

THE CLERK: Madam Forelady, have you agreed upon a verdict?

THE FORELADY: Yes, we have.

THE COURT: I may say that the Clerk of the

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-v-	:	
RALPH BROWN,	:	75 Cr. 1126 (IBC)
Defendant.	:	

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The defendant respectfully requests that the Court include the following in its charge to the jury:

ENTRAPMENT

The defendant advances the defense of entrapment, which I shall presently define.

If in fact he was entrapped, which the government denies, it is a defense to the crime charged.

Whether or not he was entrapped is a fact issue to be decided by you upon all the evidence in the case.

The function of law enforcement is not only the prevention of crime, but also the detection and apprehension of those who violate the law.

Law enforcement officials, in their efforts to enforce the laws and to detect wrongdoers, may resort to traps, decoys and deception.

The law recognizes that artifice, stratagem and stealth are necessary weapons to apprehend those engaged in, or who are about to engage in, illegal activities.

Thus, the fact that government agents merely afford favorable opportunities to a defendant for the commission of an offense does not constitute entrapment.

However, in their efforts to enforce laws, government agents or informants may not entrap an innocent person, who, except for the inducement, would not have engaged in the criminal conduct charged.

Entrapment occurs when the criminal conduct was the product of the creative activity of law enforcement agents or informants -- that is -- if they initiate, incite, induce, persuade, or lure a person to commit an offense which otherwise he or she would not commit in order that the defendant may be arrested and prosecuted.

And if that occurs, the government may not avail itself of the fruits of such instigating or inducing activities.

The defendant contends that he was induced to arrange the introduction leading to the sale of the heroin involved in this case by the government informer "Morris". He contends that, but for his inducement and persuasion, he would not have acted as he did.

The government denies that there was any entrapment and contends that the defendant was merely afforded the opportunity to commit the offense, which he was prepared to do on his own, and that he readily and willingly did so.

To raise the defense of entrapment, a defendant must adduce some evidence that the government officer, agent or informant induced him to commit the offense, that is, that the government agent or officer or persons working for them solicited, proposed, initiated, broached, or suggested the commission of the offense charged.

The defendant has offered such proof through his testimony.

If you find that the defendant has adduced some such evidence, then the government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped -- that he did not need any persuasion; in short, that he was ready and willing, without persuasion, to commit the offense whenever the opportunity offered.

To sustain its rebuttal of the defense, the government must satisfy you beyond a reasonable doubt that its agents or informant did not seduce an innocent person, but that the transaction which the defendant engaged in that resulted from the government's action was another instance of the kind of conduct that the defendant was prepared to engage in, if given the opportunity.

The proof of this may be by evidence of similar or related offenses or conduct occurring in the past, or at or about the time charged in the indictment.

The central issue is whether the defendant's activities in connection with the narcotic charges contained in this indictment were caused by the urging and inducing of the government informant or whether the informant simply afforded him the opportunity to commit the crime.

If you find that the defendant was induced to commit the crime charged by the acts and conduct of the government informant, you must acquit him.

On the other hand, if the government has proved beyond a reasonable doubt that he was ready and willing to commit the crime and was simply afforded the opportunity to do so, then the defense of entrapment fails.

Adapted from charge of the Hon. Edward Weinfeld in United States v. Kenna, 71 Cr. 226.

Respectfully submitted,

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CERTIFICATE OF SERVICE

June 8, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Ruth Silver Bruzzone